



Briefing

REVIEW OF THE MINISTERIAL POLICY STATEMENTS UNDER THE INTELLIGENCE AND SECURITY ACT 2017

To Hon Andrew Little, Minister Responsible for the GCSB and NZSIS

Date	27/09/2019	Priority	Routine
Deadline	n/a	Briefing Number	1920NSP/010

Purpose

This briefing:

- Sets out the context and background to reviewing the ministerial policy statements, as required under the Intelligence and Security Act 2017
- Seeks your agreement to the proposed approach for reviewing the ministerial policy statements
- Discusses the proposed review of the overseas cooperation ministerial policy statement.

Recommendations

1. **Note** that the ministerial policy statements are required to be reviewed before September 2020
2. **Agree** that the Department of the Prime Minister and Cabinet undertakes the reviews of the ministerial policy statements on your behalf **YES / NO**
3. **Agree** that the approach to reviewing the ministerial policy statements is the same as the approach taken to developing the ministerial policy statements in 2017 (paragraph 6) **YES / NO**
4. **Note** that the recently released Inspector-General of Intelligence and Security's report of her inquiry into possible New Zealand engagement with the CIA detention programme recommended an early review of the overseas cooperation ministerial policy statement
5. **Indicate** whether you wish to consult with relevant NGOs on the review of the overseas cooperation ministerial policy statement **YES / NO**

6. **Indicate** whether you would like to discuss the proposed review of the ministerial policy statements with officials from the Department of the Prime Minister and Cabinet. **YES / NO**

		
Tony Lynch Deputy Chief Executive National Security Group		Hon Andrew Little Minister Responsible for the GCSB and NZSIS
26/09/2019	/...../2019

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Contact for telephone discussion if required:

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Minister's office comments:

- Noted
- Seen
- Approved
- Needs change
- Withdrawn
- Not seen by Minister
- Overtaken by events
- Referred to

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REVIEW OF THE MINISTERIAL POLICY STATEMENTS UNDER THE INTELLIGENCE AND SECURITY ACT 2017

Purpose

1. This briefing:
 - Sets out the context and background to reviewing the ministerial policy statements
 - Seeks your agreement to the proposed approach for reviewing the ministerial policy statements
 - Discusses the proposed review of the overseas cooperation ministerial policy statement.

What are the ministerial policy statements?

2. Ministerial policy statements (MPSs) are required under section 206 and section 207 of the Intelligence and Security Act 2017 (the Act) to set out the responsible Minister's expectations of the GCSB and NZSIS and to provide guidance to the agencies on how certain lawful activities should be carried out.
3. In 2017, prior to the Act coming into force, the Department of the Prime Minister and Cabinet developed the MPSs on behalf of the Minister Responsible for the GCSB and NZSIS.
4. More detailed information about the MPSs, along with a sample MPS are provided at Attachments A and B.

The ministerial policy statements are required to be reviewed every three years

5. Section 214 of the Act states that the MPSs must be reviewed within three years from the date which they are signed. This means that all ministerial policy statements need to be reviewed and reissued before September 2020.

We propose the following approach for reviewing and reissuing the ministerial policy statements

The approach to reviewing the MPSs

6. When the MPSs were developed on behalf of the previous minister, we took the following approach:
 - *The MPSs should be largely principle-based – they are intended to provide guidance, not substitute for the operational policies and procedures each agency will have in place to the various activities*
 - *The MPSs should be publicly available*

- *MPSs should apply jointly to the NZSIS and GCSB where possible – in order to apply a consistent framework for both agencies*
- *Each MPS should be self-contained and the linkages should be clear*
- *Each MPS will have its own consultation plan – as the agencies with an interest in the MPS review will vary according to the activity the MPS covers.*

7. If you agree, we propose to take the same approach in reviewing the MPSs.

How we will review the MPSs

8. We will work closely with the policy, legal and operational branches of the NZSIS and GCSB during the review, in accordance with a protocol to be agreed between DPMC and the agencies. Working with the agencies, we will consider the following factors:
- How the MPSs have been incorporated into the operations of the agencies
 - Whether they have provided clear and sufficient guidance to the activities the agencies undertake and facilitate the functions of the agencies under the Act
 - Whether there have been any impediments to the operationalisation of the MPSs
 - If there have been unintended consequences, or other issues, including on the effectiveness and efficiency of the agencies to an unjustified degree
 - The comments and views of relevant oversight bodies, including the Inspector-General of Intelligence and Security (IGIS).
9. We will work with the agencies to prioritise the MPSs for review and review them in four tranches. This will allow the work to be spread over time in a manageable way, alongside other priority areas of work.
10. If there is a difference in the interpretation of the Act, or other aspects of the law during the review, Crown Law advice will be sought to provide the definitive Crown view.

The overseas cooperation ministerial policy statement will be reviewed first

11. The recently released report by the IGIS recommended an early review of the overseas cooperation MPS.
12. Section 207 of the Act requires the responsible Minister to issue an MPS to provide guidance to the intelligence and security agencies in relation to these matters:
- Co-operating with an overseas public authority
 - Providing advice and assistance to an overseas public authority
 - Sharing intelligence with an overseas public authority.
13. The IGIS, in her report *Inquiry into possible New Zealand intelligence and security agencies' engagement with the CIA detention and interrogation programme 2001-2009* (the IGIS report), recommended an early review of the MPS – Cooperation of

New Zealand intelligence and security agencies (GCSB and NZSIS) with overseas public authorities (the overseas cooperation MPS) and made several suggestions to address gaps in the MPS.

14. When the overseas cooperation MPS was developed in 2017 we were aware of the forthcoming IGIS report and included a statement within the MPS that it would be reviewed and reissued when the IGIS Inquiry was completed. In DPMC's response to the IGIS report we agreed to consider the recommendation within the review of the overseas cooperation MPS and to work with the IGIS as the review progressed.

What will the review of the overseas cooperation ministerial policy statement consider?

15. The IGIS report states that the MPS should unambiguously set out New Zealand's obligations relating to the law of torture and complicity in torture. This was not able to be achieved when the MPS was developed in 2017. The Ministry of Foreign Affairs and Trade (MFAT) is leading a process to clarify New Zealand's obligation, at international law, not to be complicit in the internationally wrongful acts of foreign partners. The advice MFAT provides as part of that process will be relevant to a range of agencies across government, including the intelligence and security agencies, New Zealand Defence Force, New Zealand Police, Customs, and DPMC. It will be relevant to understanding New Zealand's obligation not to be complicit in torture as well as its obligation not to be complicit in a range of other internationally wrongful acts. This work will inform the review of the MPS.
16. The IGIS report also identified the following gaps in the MPS, which will be considered within the review:
 - the MPS does not state that the prohibition of torture is non-derogable
 - the MPS does not specify the circumstances in which 'tainted' information might be justified
 - it does not reflect that protecting property should not be accorded primacy over protecting human rights
 - the threats or risks that, when identified, would allow the agencies to share information through human rights abuses, lack clarity
 - there is inconsistency in whether 'tainted' information may or should be passed to relevant law enforcement agencies
 - it is unclear what 'unsolicited' means in the context of an intelligence-sharing relationship
 - the MPS refers to situations where intelligence is suspected to have been gained through torture which indicates a 'credible' security risk, which does not reconcile with the statement that information gained by torture is inherently unreliable.
17. The review will consider whether there needs to be consolidated guidance for all agencies working within other states' security systems, to ensure that assistance is consistent with New Zealand's domestic and human rights obligations and consistent across government (in addition to the intelligence and security agencies, this would include all security agencies, including NZ Police, the New Zealand Defence Force, MFAT, Immigration New Zealand and New Zealand Customs).

The Act requires the minister to consult on the review of the ministerial policy statements

18. Section 211 of the Act states that the Minister must consult with IGIS, any other Minister with an interest in the proposed policy statement and any other person that the Minister considers appropriate. When the MPSs were developed, DPMC consulted on the Minister's behalf. Agencies who were consulted included the Office of the Privacy Commission, the Human Rights Commission, Department of Internal Affairs, MFAT, Ministry of Justice, Ministry for Primary Industries, New Zealand Police, New Zealand Customs Service and Ministry of Transport.

Consultation on the overseas cooperation MPS

19. The IGIS report recommended that 'relevant NGOs' are consulted on the review of the overseas cooperation MPS. While not listed in the report, relevant NGOs in this context might be Amnesty International, Human Rights Watch and the International Committee of the Red Cross.
20. Consultation with NGOs is not a requirement of the Act, and is a decision for the Minister. The IGIS report does not set out the benefits of consulting with relevant NGOs, although we expect it is because these organisations have a specific focus and oversight role in relation to international human rights, and can provide an alternative view that is not solely that of the government.
21. A potential risk of consulting with NGOs is that it may cause difficulties if their views are not reflected in the final MPS for any reason, or if the consulted parties have differing views. Consulting with NGOs is likely to add time to the review process. It may also set expectations that we would consult on each of the MPSs, which would risk the completion of the review and reissue of the MPSs in the required time.
22. As with the development of this MPS, we will consult with the Human Rights Commission in reviewing the overseas cooperation MPS. As the central agency for advocating and promoting human rights in New Zealand our view is that consultation with the Human Rights Commission is sufficient to gather a specific human rights perspective.
23. If you wish to consult with relevant NGOs on the overseas cooperation MPS we are able to do this on your behalf. We can prepare advice on the specific NGOs that might be suitable.

Consultation

24. The NZSIS, the GCSB and MFAT were consulted on this briefing and their views incorporated.

Next steps

25. We are available to discuss the proposed review of the MPSs with you if you wish.
26. If you agree with the recommendations, we will, in collaboration with the agencies, develop a detailed plan for the review, including opportunities to consult with you on the drafts as

they progress. We will provide this plan to your office, for your information.

27. We will update you regularly as the review progresses.

Proposed timing

28. The MPSs will be reviewed in tranches. We will set out the timing in the forthcoming detailed plan.

29. The review of the overseas cooperation MPS will begin immediately. Our aim is to provide the draft MPS for your consideration by the end of 2019 (subject to the work MFAT is leading to formalise a statement of New Zealand's obligations regarding the law of torture and complicity in torture).

30. The IGIS report also recommended that the agencies' Joint Policy Statement on Human Rights Risk Management (the JPS) is reviewed. The review of the JPS will need to occur following the review of the overseas cooperation MPS, so that any changes to the MPS are reflected in the JPS.

31. The statutory deadline for completion of the review is September 2020. We will aim to have all MPSs reviewed and reissued by early August 2020.

Attachments:	
Attachment A:	Ministerial policy statements – background information
Attachment B:	Sample ministerial policy statement – Creating and maintaining a legal entity under subpart 2 of Part 3 of the Intelligence and Security Act 2017

ATTACHMENT A

Ministerial policy statements – background information

What activities do the ministerial policy statements cover?

1. The activities the MPSs cover generally relate to those lawful activities that have a level of risk associated with them, intrusion on privacy, or involve some kind of deception. The Act requires the Minister to issue MPSs on these activities:
 - Providing information assurance and cybersecurity activities with the consent of the party to whom those services are provided
 - Acquiring, using and maintaining an assumed identity
 - Creating and maintaining a legal entity (such as a cover company)
 - Collecting information lawfully from persons without an intelligence warrant or authorisation given under section 78 (human intelligence activities)
 - Conducting surveillance in a public place
 - Obtaining and using publicly available information (open source information)
 - Making requests for information from other agencies under section 121 of the Act
 - Information management
 - Making false or misleading representations about being employed by an intelligence and security agency under section 228
 - Activities covered by the exemption from the Land Transport (Road User) Rule 2004 that is conferred by section 231 of the Act
 - Cooperation with overseas public authorities, including providing advice and assistance to and sharing intelligence with overseas public authorities.
2. The Minister may also issue additional MPSs where he or she considers that guidance on any activity is desirable.
3. The MPSs are publicly available on the New Zealand Intelligence Community website.

What effect do the ministerial policy statements have?

4. The Directors-General and all employees of GCSB and NZSIS must consider the requirements and guidance in an MPS when carrying out the activity covered by it. While it is not compulsory for an employee to comply with a ministerial policy statement, there would need to be a very good reason for not complying and the employee would need to be able to justify that.
5. The MPSs require GCSB and NZSIS to put policies and procedures in place to ensure employees are acting lawfully and appropriately when carrying out the activities to which the ministerial policy statements relate. They also require GCSB and NZSIS to consult other agencies with an interest or expertise in matters related to the activity being carried

out. Some MPSs also set out particular training that must be provided to employees who are carrying out the activity to which the particular MPS relates.

6. The Inspector-General of Intelligence and Security must also take any MPS into account when conducting an inquiry into the activities of the intelligence and security agencies.

What information do the ministerial policy statements contain?

7. As required by section 210 of the Act, the MPSs contain guidance on:
 - Procedures for authorising individual employees to carry out the activity (if applicable)
 - Any protections that must be in place in relation to the activity
 - Any restrictions on the activity that must be applied.

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ATTACHMENT B

Ministerial Policy Statement example – Creating and maintaining a legal entity under subpart 2 of Part 3 of the Intelligence and Security Act 2017

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Briefing

REVIEW OF THE OVERSEAS COOPERATION MINISTERIAL POLICY STATEMENT: PROPOSED CONSULTATION PLAN

To Hon Andrew Little, Minister Responsible for the GCSB and the NZSIS

Date	24/01/2020	Priority	Routine
Deadline	31/01/2020	Briefing Number	1920NSP/031

Purpose

This briefing:

- Seeks your agreement to a consultation plan for consulting with non-government organisations on the Ministerial Policy Statement: *Cooperation of New Zealand intelligence and security agencies (GCSB and NZSIS) with overseas public authorities.*
- Updates you on the review of the Ministerial Policy Statements.

Recommendations

1. **Note** that in September 2019 you agreed the Department of the Prime Minister and Cabinet would consult, on your behalf, with non-government organisations on the review of the overseas cooperation ministerial policy statement
2. **Agree** that the Department of the Prime Minister and Cabinet consult with the following organisations:
 - 2.1 Human Rights Foundation YES / NO
 - 2.2 New Zealand Council for Civil Liberties YES / NO
 - 2.3 Amnesty International YES / NO
 - 2.4 Privacy International YES / NO
3. **Agree** to the attached consultation plan YES / NO

REVIEW OF THE OVERSEAS COOPERATION MINISTERIAL POLICY STATEMENT:
PROPOSED CONSULTATION PLAN

1920NSP/031

4. **Note** that we aim to deliver the first two draft Ministerial Policy Statements to consider for Ministerial consultation in early February 2020.


Tony Lynch
**Deputy Chief Executive
National Security Group**

23 / 01 / 2020
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Hon Andrew Little
**Minister Responsible for the GCSB and
NZSIS**

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Contact for telephone discussion if required:

Name	Position	Telephone	1st contact
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Lynda Byrne	Principal Policy Advisor, Security and Intelligence Policy	s9(2)(a)	✓
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Minister's office comments:

- Noted
- Seen
- Approved
- Needs change
- Withdrawn
- Not seen by Minister
- Overtaken by events
- Referred to

REVIEW OF THE OVERSEAS COOPERATION MINISTERIAL POLICY STATEMENT: PROPOSED CONSULTATION PLAN

Purpose

This briefing:

- Seeks your agreement to a consultation plan for consulting with non-government organisations on the Ministerial Policy Statement (MPS): *Cooperation of New Zealand intelligence and security agencies (GCSB and NZSIS) with overseas public authorities* (the Overseas Cooperation MPS).
- Updates you on the review of the MPSs.

You agreed to consult with NGOs on the Overseas Cooperation MPS

1. In September 2019, we briefed you (1920NSP/010) on the proposed approach to reviewing the MPSs required under Section 207 of the Intelligence and Security Act 2017 (the Act). We noted that the review of the Overseas Cooperation MPS would be started first.

The Overseas Cooperation MPS

2. Section 207 of the Act requires the responsible Minister to issue guidance to the intelligence and security agencies on:
 - Co-operating with an overseas public authority
 - Providing advice and assistance to an overseas public authority
 - Sharing intelligence with an overseas public authority.
3. The first Overseas Cooperation MPS was issued in 2017 (Attachment A). The MPS provides guidance for the GCSB and NZSIS in relation to all forms of cooperation with overseas public authorities. It states that, when making decisions related to foreign cooperation, the agencies must have regard to the principles of legality, human rights obligations, necessity, reasonableness and proportionality, protections for New Zealanders, information management, and oversight. It also sets out the procedures to authorise intelligence cooperation, assistance and sharing, and the protections and restrictions that need apply.

The IGIS report recommended early review of the Overseas Cooperation MPS

4. At the time of issue of the MPS, the Inspector General of Intelligence and Security (IGIS) was inquiring into whether NZSIS and GCSB had any connection to the CIA's enhanced interrogation, detention and rendition programme in Afghanistan between 2001-2009 (the IGIS Report). The Overseas Cooperation MPS noted this work by the IGIS was ongoing, and that 'when completed, the conclusions from that Inquiry may give cause for the issuing Minister to review and reissue the MPS'.

5. The IGIS report recommended an early review of the Overseas Cooperation MPS, having regard to the gaps that were identified in the report. It also recommended consulting with relevant NGOs on the review of the MPS, which you subsequently agreed to.

Consultation will improve the support and quality of the Overseas Cooperation MPS

6. The Overseas Cooperation MPS has strong public interest elements. This MPS requires significant human rights responsibilities and implications (particularly relating to torture) be considered by intelligence agencies when cooperating with overseas authorities. Conducting engagement that considers the concerns and expertise of relevant NGOs will strengthen the Overseas Cooperation MPS and potentially increase confidence in the intelligence agencies.
7. To refine the scope of consultation, officials have considered the recommendations in the IGIS Report alongside the recent consultation on the United Kingdom's *Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas, and on the Passing and Receipt of Intelligence Relating to Detainees*. We propose the following key areas of focus for consultation:
 - How to clearly articulate the responsibilities and obligations relating to torture within the MPS (including the non-derogable nature of torture).
 - Defining exceptional circumstances, public emergencies and/or credible risks to national security where 'tainted' information, i.e. information likely obtained by torture, might be passed to relevant law enforcement agencies.
 - How agencies should weigh up competing rights and interests, such as loss of life, significant personal injury, critical national infrastructure, and/or property.

We recommend early targeted consultation with a small number of relevant organisations

8. We recommend undertaking a targeted consultation with a small number of NGOs that promote and defend human rights, and understand New Zealand's international human rights obligations. The organisations we suggest consulting are:
 - Human Rights Foundation
 - New Zealand Council for Civil Liberties
 - Amnesty International
 - Privacy International.
9. These organisations have been suggested as they have been nominated by the IGIS as leaders domestically and/or internationally within the human rights NGO community, they have strong engagement records on policy, and they have a New Zealand based contact point that can be used to engage their wider organisation and/or network. Other NGOs considered included Transparency International New Zealand and the Privacy Foundation New Zealand. We have limited the number to the selected NGOs to enable the best use of limited consultation resource and to avoid duplication.

10. The draft proposed consultation document (Attachment B) contains further details, including consultation questions based on the suggested focus areas. We propose to send the agencies the consultation document and seek written feedback.
11. Responses from this consultation will be balanced alongside other consultation required under the Act. The Act requires you to consult with the Inspector-General of Intelligence and Security, any other Minister with an interest in the policy statement and any other person that you consider appropriate. In addition to the GCSB and the NZSIS, consultation amongst Government agencies may include MFAT, MOJ, NZDF, CLO, the Privacy Commissioner, and the Human Rights Commission.
12. We are also engaging with MFAT's ongoing development of legal advice to agencies regarding aid and assistance at international law, to ensure the MPS is aligned with this advice.

There are risks with consulting with non-government organisations

13. We have identified the following risks and mitigations as part of the consultation plan.

Risk	Mitigation
Participants feel their views are not taken into consideration and criticise the review	DPMC will respond and engage with participants to ensure clarity and transparency where possible
Participants are unable to contribute their written submission within the timeframe available	DPMC will discuss individual circumstances as they may arise, and accept verbal submissions if necessary
There is negative public or media interest in the review	DPMC will work with your office, the NZSIS and GCSB to develop reactive talking points to respond to media interest
Participants wish to contribute to other MPS reviews, or international cooperation procedures or matters beyond the scope of this MPS	The consultation document will make it clear that we are only seeking input into the review of this MPS, given the significant interest in human rights issues. The consultation document will also make it clear that we are not seeking feedback on operational matters relating to cooperating with foreign authorities.

Next Steps

14. If you agree to the proposed consultation plan, we will contact the proposed NGOs in February 2020.
15. We are reviewing the 11 MPSs in four tranches and have begun the first tranche. Aside from the Overseas Cooperation MPS, the first tranche includes the MPSs on *Road user rules exemption* and *Conducting surveillance in a public place*. We expect to have a draft

of these MPSs for consultation with your ministerial colleagues by early February 2020.

- 16. We remain available to discuss with you, or your office, the review of the MPSs if you wish.

Consultation

- 17. The Office of the IGIS was consulted on the proposed list of NGOs for consultation. The GCSB and NZSIS were consulted on this briefing and their views incorporated.

Attachments:		
Attachment A	Unclassified	Current Overseas Cooperation MPS
Attachment B	Unclassified	Draft Overseas Cooperation MPS NGO Consultation Document

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Attachment A

Current Overseas Cooperation MPS

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Ministerial Policy Statement

Cooperation of New Zealand intelligence and security agencies (GCSB and NZSIS) with overseas public authorities

Summary

It is important for New Zealand's security for the Government Communications Security Bureau (GCSB) and New Zealand Security Intelligence Service (NZSIS) to cooperate with overseas public authorities, including overseas intelligence agencies.

This ministerial policy statement (MPS) provides guidance for GCSB and NZSIS in relation to all forms of cooperation with overseas public authorities. In making decisions related to foreign cooperation, employees must have regard to the following principles: legality, human rights obligations, necessity, reasonableness and proportionality, protections for New Zealanders, information management and oversight. This MPS also specifies certain additional matters to be included in internal policy and procedures.

Definitions

The Act means the *Intelligence and Security Act 2017*.

Cooperation means any form of interaction, whether reciprocal or not, with an overseas public authority, including but not limited to training, advice, assistance, and sharing of information, intelligence, analysis, methods and technology.

GCSB means the Government Communications Security Bureau.

NZSIS means the New Zealand Security Intelligence Service.

Overseas public authority means a foreign person or body that performs or exercises any public function, duty, or power conferred on that person or body by or under law.

Personal information means information about an identifiable individual.

Purpose

1. This MPS is issued by the Minister Responsible for the GCSB and the Minister in Charge of the NZSIS pursuant to section 207(1) of the Act.
2. The purpose of the MPS is to provide guidance to GCSB and NZSIS on the conduct of activities that involve cooperation with overseas public authorities. The MPS comprises the Minister's expectations for how GCSB and NZSIS should properly perform their functions and establishes a framework for good decision-making and best practice conduct.
3. MPSs are also relevant to oversight of the agencies by the Inspector-General of Intelligence and Security in the exercise of her propriety jurisdiction (the Act requires the Inspector-General of Intelligence and Security to take account of any relevant MPS and the extent to which an agency has had regard to it when conducting any inquiry or review). A copy of this MPS will also be provided to the Intelligence and Security Committee of Parliament.
4. Every employee making decisions or taking any action related to cooperating with an overseas public authority must have regard to this MPS. Employees should be able to explain how they had regard to the MPS. This might amount to an explanation of their consideration of any relevant internal policy or procedures that reflect the MPS. The Directors-General are responsible for ensuring the MPS is reflected in their agency's internal policies and procedures. If any action or decision is taken that is inconsistent with the MPS, employees must be able to explain why the action was taken and how they had regard to the MPS.

Scope

5. This MPS applies to cooperating with an overseas public authority, which includes providing advice and assistance to an overseas public authority and sharing intelligence with an overseas public authority. These activities may occur in relation to any of the functions of GCSB and NZSIS as specified or allowed for in sections 10 to 15 of the Act.
6. For the purposes of this MPS a broad interpretation of cooperation applies, in that specific activities may or may not be reciprocal, but will in some way involve GCSB or NZSIS interaction with an overseas public authority (also referred to as a foreign partner). To this end, it includes the provision of services, advice, assistance and intelligence which is not reciprocated, as well as reciprocally sharing intelligence, acting cooperatively on a project, or providing and receiving services, advice, and assistance. Cooperation may include an overall cooperative relationship between GCSB or NZSIS and an overseas public authority, interactions between employees of GCSB or NZSIS and the overseas public authority, or specific activities that occur as part of cooperation with a foreign partner.
7. GCSB and NZSIS may only request overseas public authorities to carry out activities that, if carried out by GCSB or NZSIS without an authorisation would be unlawful, in accordance with an authorisation issued under part 4 of the Act. In addition, the Directors-General of GCSB and NZSIS may request those authorities (or their personnel) to assist GCSB or NZSIS with giving effect to an authorisation (see section 51(1)). The carrying out of these types of authorised activities must be conducted consistently with the Act and the terms of the relevant authorisation, including any restrictions or conditions set out in the authorisation. This MPS does not apply to requests for assistance and activities which are carried out under an authorisation issued under part 4 of the Act.
8. The primary purpose of this MPS is to provide guidance on determining which overseas public authorities GCSB and NZSIS should engage with, and how that engagement should be

regulated, including guidance on the types of activities that are appropriate to undertake with those parties. To the extent that it arises through cooperation with an overseas public authority, the MPS also addresses issues associated with the operational use of intelligence gained from a foreign partner.

Context

9. GCSB's and NZSIS's objectives are set out in the Act. Both agencies contribute to:
 - a) The protection of New Zealand's national security;
 - b) The international relations and well-being of New Zealand; and
 - c) The economic well-being of New Zealand.
10. GCSB and NZSIS do this through the performance of their statutory functions, which include:
 - a) Intelligence collection and analysis;
 - b) The provision of protective security services, advice and assistance;
 - c) Cooperation with other public authorities to facilitate their functions; and
 - d) Cooperation with other entities to respond to imminent threat.
11. MPSs are an important component of the measures put in place by the Act to ensure the functions of GCSB and NZSIS are performed with propriety and in accordance with New Zealand law and all human rights obligations recognised by New Zealand law.

New Zealand's intelligence and security relationships

12. The mandate provided by the agencies' objectives and functions is a New Zealand-centric one. Foreign cooperation is based on furthering New Zealand's interests and fulfilling any international obligations New Zealand has.
13. GCSB and NZSIS may cooperate with overseas public authorities in fulfilling any of GCSB's and NZSIS's functions. New Zealand gains significant value from international intelligence sharing and cooperation arrangements, particularly within the current climate of global and transnational threats. Through foreign intelligence partnerships and other cooperation, GCSB and NZSIS are able to draw on a much greater pool of information, skills and technology than would otherwise be available to them. Close and reliable relationships with overseas public authorities help GCSB and NZSIS to prioritise and focus their limited resources on the areas most important to New Zealand, while having access to resources that would not normally be available.
14. For example, a foreign partner may have access to information that requires specific linguistic, ethnic or cultural backgrounds to collect and analyse which New Zealand does not possess. As part of their intelligence collection and analysis function, GCSB and NZSIS may seek to obtain that intelligence. Similarly, GCSB or NZSIS might provide intelligence to an overseas public authority so that authority can take action to address a threat to New Zealand's national security (such as a threat to New Zealanders overseas), or to contribute to New Zealand's international relations with the partner country.
15. In the context of protective security services, advice and assistance, GCSB or NZSIS might provide technology or expertise to an overseas public authority (which might include seconding staff) to support that authority with its own protective security requirements, such as systems for vetting security cleared personnel, or detecting cybersecurity threats. This

- advice and assistance could contribute to New Zealand's national security by mitigating common threats and developing international relations with the partner countries, and contribute to New Zealand's economic well-being by reducing risks to New Zealand companies operating overseas.
16. The closest relationships that GCSB and NZSIS have with overseas public authorities are those with equivalent agencies from Australia, Canada, the United Kingdom and the United States (often referred to as the "Five Eyes" partners). The relationships between Five Eyes partners are long-running, reciprocal, cover a wide range of topics, and involve a high degree of mutual trust, honesty and respect. The relationships provide New Zealand with knowledge and capability far beyond what we can afford on our own.
 17. These relationships work effectively due to the shared values and histories of the five countries and the strong relations between the governments of those countries in general. The depth of the Five Eyes relationship means that disparities in size, power and influence do not prevent any member from acting in the best interests of their own government, and members expect to be able to disagree on specific matters without damaging the broader relationship.
 18. GCSB and NZSIS may also cooperate with overseas public authorities from other countries. This cooperation may occur on a routine or relatively ad hoc basis. The reasons for cooperating with such authorities may vary widely and may occur in the course of performing any of the agencies' functions and as part of contributing to any of their objectives. It is essential to New Zealand's ability to protect its national security, international relations and economic well-being to share information and intelligence with agencies outside traditional partnerships.

International obligations

19. New Zealand may be subject to international obligations to cooperate with overseas partners, in order to promote the exchange of information to help improve international responses to threats to global peace and security. For example, United Nations Security Council Resolution 1373 (2001) calls on states to "find ways of intensifying and accelerating the exchange of operational information, especially regarding actions and movements of terrorist persons or networks". Under this resolution, Member States are required to have in place procedures and mechanisms that encourage exchange of information in accordance with international and domestic law, which includes international human rights obligations.
20. The many positive benefits of New Zealand's participation in foreign intelligence and security relationships do not override the rights of New Zealanders and the international human rights obligations New Zealand has adopted through their incorporation into domestic law. New Zealand is also subject to other international obligations, including through customary international law and as a member of the United Nations. For example, New Zealand is bound by United National Security Council Resolution 1456 (2003), which requires Member states to "ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee and humanitarian law".
21. New Zealand's core international human rights obligations, including those at customary international law, are detailed at Appendix One. They include the right to life, the right not to be subjected to torture, the right not to be subjected to cruel, inhuman or degrading treatment or punishment, and the right to liberty and security of the person.

22. The New Zealand Government has a long-standing and strong opposition to the use of torture, cruel, inhuman or degrading treatment or punishment (including the death penalty) in all cases and under all circumstances, including in response to threats to national security. New Zealand is committed to actively preventing torture, cruel, inhuman or degrading treatment or punishment, and will not, by act or omission, encourage, aid, or abet such action.

Duty to act with due diligence

23. Section 17(a) of the Act imposes a general duty on GCSB and NZSIS to act in accordance with New Zealand law and all human rights obligations recognised by New Zealand law. Sections 10(3) and 12(7) also explicitly impose an obligation on the responsible Minister to be satisfied the agencies will be acting consistently with such law when authorising the sharing of intelligence, analysis and threat reporting with foreign partners. Compliance with this obligation necessitates a practice of due diligence by the Directors-General of GCSB and NZSIS in relation to cooperation with overseas public authorities. The guidance in this MPS provides a framework for exercising that due diligence when determining whether it will be appropriate to engage with a particular overseas public authority, and when determining that the proposed activities are consistent with the law – particularly with respect to ensuring that GCSB and NZSIS do not become complicit in human rights abuses.
24. The Directors-General have a duty to take steps as are reasonable in the circumstances of each particular situation to identify risks of human rights being breached by partner countries and international actors. To ensure that agencies are not associated (either directly or indirectly) with activities that may be unlawful or improper, as a result of cooperation with an overseas public authority, it is expected that GCSB and NZSIS will establish an awareness of and regularly monitor the human rights practices of any overseas public authorities with which the agencies cooperate. The agencies are also expected to further enquire when there is an indication that human rights breaches might occur in a situation, and decline or stop cooperating with the overseas public authority where a real or substantial risk of breach of human rights obligations (such as the prohibition of torture) is identified.
25. Failure to act in accordance with the provisions of the Act and this MPS could lead to possible criminal responsibility for employees of GCSB and NZSIS. For example, Section 3 of the Crimes of Torture Act 1989, which applies to activities conducted within or outside New Zealand, makes it a crime for a public official or anyone acting in an official capacity to attempt or to commit an act of torture, to act or omit to act in a way that aids any person to commit an act of torture, to abet any person in the commission of an act of torture, or to incite, counsel, procure or conspire with any person to commit an act of torture, and to be an accessory after the fact to an act of torture.

Unsolicited intelligence

26. The absolute prohibition in international law (and which is incorporated in New Zealand law) on the use of information gained through torture for evidentiary purposes arises from the need to remove any incentives to torture and recognises that such information is inherently unreliable. This obligation is non-derogable – it cannot be violated by states under any circumstances.

27. There may be exceptional circumstances where unsolicited intelligence is received by GCSB or NZSIS that indicates a credible national security threat to New Zealand or risk to New Zealanders that has been, or is suspected to have been, obtained through human rights abuses committed by another party.
28. GCSB and NZSIS do not have an enforcement function in relation to measures to protect national security. If intelligence is received that indicates a credible risk to the safety of New Zealanders that requires action to be taken to protect lives and property, GCSB and NZSIS must provide that information to the relevant enforcement agency. The information will not be used for evidentiary purposes in legal proceedings.

Principles

29. The following principles constitute a framework for good decision-making and must be taken into account by GCSB and NZSIS when cooperating with overseas public authorities in the performance of one or more of the agencies' functions. All forms of cooperation with overseas public authorities, at all levels, should be subject to ongoing review as to whether it continues to be consistent with these principles.

Legality

30. GCSB and NZSIS must ensure that cooperation with overseas public authorities is conducted in accordance with New Zealand law and all human rights obligations recognised by New Zealand law. GCSB and NZSIS should also have regard to New Zealand's human rights obligations at international law, including customary international law (see Appendix One).
31. For all forms of cooperation with overseas public authorities, GCSB and NZSIS must have internal policies in place that ensure the agencies act in accordance with New Zealand law and all human rights obligations recognised by New Zealand law; and must have procedures in place to ensure those policies have been adhered to. Where appropriate, legal advice should be sought.
32. Where Ministerial approval for cooperation is required, GCSB and NZSIS have a positive obligation to provide sufficient information regarding the legality of cooperation with overseas public authorities to the Minister, in order for the Minister to determine whether the requirements under sections 10(3) and 12(7) of the Act are met.
33. Where there may be uncertainty or cause for concern as to whether cooperation with an overseas public authority is lawful, specific information detailing the nature of the cooperation and the factors that gave rise to that uncertainty or concern (such as examples of previous actions by the foreign partner, external reports, or advice from the Ministry of Foreign Affairs and Trade) should be provided to the responsible Minister (in the case of Ministerial approvals) to assist decision-making, or to the Director-General (in the case of internal approvals).
34. Where necessary, the Ministry of Justice should be consulted on New Zealand's human rights law and information sought from the Ministry of Foreign Affairs and Trade regarding New Zealand's international human rights obligations and the adherence of other countries to these obligations.

Human rights obligations

35. GCSB and NZSIS must not undertake any activity in cooperation with an overseas public authority, including receiving or sharing any intelligence, where GCSB or NZSIS knows or assesses that there is a real risk that the activity will lead to or has been obtained as a result of human rights breaches in any country, against any person(s). In these circumstances, the continued receipt or sharing of intelligence should cease, subject to a reassessment in accordance with legal obligations, the principles in this MPS and relevant policies.
36. This provides a duty to apply due diligence: GCSB and NZSIS are to assess the likelihood of human rights breaches occurring (or having occurred) in connection with any sharing of intelligence or cooperation by the agencies with an overseas public authority, including in any subsequent actions taken by that public authority as a result of the cooperation or sharing of intelligence.
37. To avoid any complicity in human rights breaches by an overseas public authority, when assessing this likelihood, GCSB and NZSIS must take into account factors such as:
 - the human rights record of the country or public authority, and any other country or public authority that may also be involved, including consideration of reports from credible international, governmental and non-governmental organisation sources;
 - whether the country has ratified relevant international human rights treaties, including any reservations that may have been made;
 - whether the country has mechanisms for independently investigating breaches of human rights;
 - whether the country has an independent judiciary with jurisdiction to hear cases relating to breaches of human rights;
 - whether the country has an established history of compliance with human rights obligations;
 - whether the country has an established history of investigating and prosecuting human rights breaches; and
 - whether the country has a legal framework and institutional arrangements that guide and appropriately constrain the activities of the country's intelligence and security sector.
38. When authorising the provision of intelligence and analysis, or the provision of threat reports produced from the provision of information assurance and cybersecurity activities, to an overseas public authority, the responsible Minister must be satisfied that GCSB and NZSIS will be acting in accordance with New Zealand domestic law, including all human rights obligations recognised by New Zealand law.
39. The Minister must be satisfied of this on the basis of information provided to him or her by GCSB or NZSIS about the particular proposal to share intelligence, analysis or threat reporting. The Minister's authorisation may be made on a case-by-case basis or may take the form of a broader standing authorisation, for example to share specific categories of intelligence, analysis or threat reporting with certain overseas public authorities, or to share the full range of intelligence, analysis or threat reporting within an established intelligence and security relationship with a foreign country, groups of countries or overseas public authority.

40. A request to share intelligence, analysis and threat reporting with a foreign partner, whether on a case-by-case basis, or within the context of a broader standing authorisation, must include information about the specific proposal and must include an assessment of the human rights practices of the foreign partner, or describe the process by which the agencies will make that assessment. The assessment must be based on:
- the human rights record of the country (as reflected in the considerations at paragraph 37 above)
 - any particular risks to human rights associated with the proposed cooperation and how likely it is that breaches could occur; and
 - factors that mitigate the likelihood of human rights breaches occurring. Such factors might include the existence and effectiveness of mechanisms for monitoring or reviewing compliance with human rights obligations, the reliability of any assurances provided by the foreign partner about how information will be used or how information to be provided was obtained, and how likely the foreign partner is to comply with caveats associated with cooperation or use of information.
41. The decision to authorise the sharing of intelligence, analysis or threat reporting with a foreign partner, whether made by the Minister on a case-by-case basis or by the agencies within a broader standing authorisation, must also consider:
- all applicable legal obligations under New Zealand and international law, and any relevant international commitments New Zealand may have; and
 - the purpose of the intelligence sharing, including how it contributes to GCSB's and NZSIS's statutory objectives to contribute to the protection of New Zealand's national security, the international relations and well-being of New Zealand, and the economic well-being of New Zealand.
42. The responsible Minister may issue standing authorisations for GCSB or NZSIS to share specific classes of intelligence, analysis and threat reporting with certain overseas public authorities, or to share intelligence, analysis and threat reporting with a specific overseas public authority or with a particular country or group of countries. When issuing a standing authorisation, the Minister must be satisfied on the basis of an assessment which considers the same factors in paragraphs 40 and 41 above. Standing authorisations may specify conditions, limits or exclusions that apply in respect of the sharing of intelligence, analysis and threat reporting under the authorisation. The Minister will specify thresholds of risk at which decisions made under a standing authorisation must be referred back to the responsible Minister.
43. The existence of a standing authorisation does not excuse GCSB and NZSIS of the obligation to undertake ongoing monitoring to ensure that cooperation undertaken under the authorisation remains consistent with the framework in this MPS. In particular, the agencies must conduct a risk assessment of human rights breaches occurring if there is any reason to believe a specific instance of cooperation might lead to such an infringement. Further, if there is evidence that a human rights breach has occurred, or there are changes to domestic policy or practice in any country subject to a standing authorisation that may increase the likelihood of violations of human rights, the standing authorisation must be reviewed by the responsible Minister.

44. Where Ministerial authorisation for cooperation is not required, GCSB and NZSIS must have processes that require internal authorisation to cooperate with an overseas public authority to be granted by appropriately senior staff, according to an assessment of the risk of human rights breaches connected with that cooperation. Where there is a reasonable basis for concern about a country's human rights record or that the cooperation in question might involve complicity in breaches of human rights, GCSB and NZSIS must seek authorisation from the responsible Minister before undertaking any cooperation. GCSB and NZSIS must provide the Minister with an assessment that addresses the factors outlined at paragraphs 40 and 41.
45. If GCSB or NZSIS become aware that their cooperation with an overseas public authority means GCSB or NZSIS may have been complicit in human rights breaches the agency must immediately suspend cooperation with that authority (and any others related to it) and notify the responsible Minister and the Inspector-General of Intelligence and Security, and if necessary, the Solicitor-General. An internal review to determine whether agency policies and procedures were correctly applied in respect of the cooperation must also be conducted by the relevant agency.
46. In the event GCSB or NZSIS receives unsolicited information indicating a credible national security risk to New Zealand or risk to the safety of New Zealanders, but that has been, or is suspected to have been, obtained through human rights abuses committed by another party the Directors-General will consider the need to ensure public safety and the protection of life and property in determining whether to pass that information to the relevant enforcement agency. In considering whether to pass on the information for operational purposes, GCSB and NZSIS must be mindful that the reliability of such information may be limited. Where information of this nature is passed on, the responsible Minister and the Inspector-General of Intelligence and Security must be informed as soon as practicable.

Necessity

47. Cooperation by GCSB or NZSIS with any foreign partner must be for the purpose of protecting New Zealand's national security, the international relations and well-being of New Zealand, and the economic well-being of New Zealand. Specific cooperation with overseas public authorities should only occur for purposes necessary to support the agencies to perform their statutory functions. This may include building the capacity of GCSB or NZSIS to perform a particular statutory function, or for establishing or maintaining an international relationship that will support GCSB or NZSIS to perform their statutory functions.

Reasonableness and proportionality

48. The impact of cooperation with overseas public authorities (including any specific activities carried out as part of that cooperation) should be reasonable and proportionate to the purpose for carrying out that cooperation, the benefit gained from the cooperation, and the reputational risk to GCSB, NZSIS or the New Zealand Government.
49. Relevant factors in determining the reasonableness and proportionality of cooperation with an overseas public authority include:
- having a clear understanding of the nature and purpose of the specific activities and any subsequent actions that are likely to result;

- having a clear understanding of the nature and purpose of the intelligence and security relationship with the particular overseas public authority;
 - being aware of the status of the bilateral relationship with the country as a whole (especially any issues or areas of sensitivity between New Zealand and the partner country that could have a bearing on the proposed activities);
 - any limitations or restrictions on activity that either party has; and
 - any protections that may be in place in relation to the activity or to intelligence provided or received.
50. For example, when New Zealand is seeking assistance or intelligence or information from partners, GCSB or NZSIS should be clear as to why they seek the assistance or intelligence or information from the partner country, and about the expectations of the New Zealand Government that no human rights breaches occur in the provision of that assistance or in the collection or provision of the intelligence or information.
51. Where New Zealand is asked to provide assistance, intelligence or information by overseas partners, GCSB or NZSIS should be as informed as is possible about the particular situation. This should include being aware of the purpose and value of the proposed activity and that there is sufficient evidence, not based on human rights breaches, of the need for the activity.
52. For example, when sharing intelligence, this would include consideration of whether this was reciprocal sharing of intelligence on a routine and systematic basis, as part of a wider intelligence relationship; regular sharing of intelligence but on a case-by-case basis; responding to one-off ad hoc (and potentially urgent) requests for intelligence; or pro-active ad hoc sharing by the agencies to mitigate a risk to a third country.

Protections for New Zealanders

53. When cooperating with overseas public authorities, GCSB and NZSIS must continue to apply the same protections for New Zealand citizens and permanent residents that would normally apply in New Zealand in relation to the specific activity. GCSB and NZSIS must not cooperate with an overseas public authority for the purposes of avoiding or circumventing those protections.
54. Where cooperation with an overseas public authority involves the sharing of intelligence or personal information relating to New Zealanders, GCSB and NZSIS must have particular regard to the privacy interests of the New Zealanders when determining whether to disclose that personal information to overseas partners, or when requesting such information from overseas partners. This includes adherence to the [information privacy principles](#) contained in Part 2 of the Privacy Act 1993 as they apply to GCSB and NZSIS. GCSB and NZSIS must be satisfied that the overseas public authority has adequate protections in place for the use and storage of New Zealanders' information, including adequate protections against further sharing with third parties without express consent from GCSB or NZSIS.

Information management

55. GCSB and NZSIS will take steps to ensure that information obtained by GCSB and NZSIS and subsequently shared with overseas public authorities is managed in accordance with all information management requirements, standards and guidelines that relate to that information (such as the New Zealand Protective Security Requirements, New Zealand

Government Security Classification System, and New Zealand Information Security Manual), and any other obligations as addressed in the MPS on *Management of information obtained by GCSB and NZSIS*.

56. GCSB and NZSIS are to specify the protection, storage and use (including restrictions on the passing on of that information to any third parties) requirements that are to be adhered to in respect of any information, including personal information about New Zealanders, shared with an overseas public authority. Those requirements will be consistent with the principles in this MPS and the MPS on *Management of information obtained by GCSB and NZSIS*. It is recognised that the overseas public authority may be required to adhere its own national requirements when managing received information and this may conflict with conditions imposed by GCSB or NZSIS. GCSB and NZSIS should seek to be consulted regarding any national requirements of an overseas partner that may lead to shared information being used in a manner that conflicts with restrictions that would apply in New Zealand.

Oversight

57. GCSB and NZSIS must carry out all cooperation with overseas public authorities in a manner that facilitates effective accountability, transparency and oversight. This includes the use of clear authorisation procedures, the keeping of appropriate records, maintaining up-to-date internal policies and procedures and guidance for staff, and reporting to the responsible Minister on the nature and outcomes of cooperation with overseas public authorities. Reporting must include a specific section in GCSB and NZSIS annual reports on the agencies' intelligence and security relationships with overseas partners.

Matters to be reflected in internal policies and procedures

58. GCSB and NZSIS must have, and act in compliance with, internal policies and procedures that are consistent with the requirements and principles above, and must have systems in place to support and monitor compliance. Those policies and procedures must also address the following additional matters:

Human rights policy

GCSB and NZSIS must have a policy setting out the factors that must be considered when assessing whether a real risk of human rights breaches may exist in connection with cooperation with overseas public authorities. This policy must also include what specific information is required to be provided to the responsible Minister before authorisation (either on a case-by-case basis or in the form of a broader standing authorisation) is given to share intelligence or analysis to an overseas public authority.

This policy is important to ensure that employees do not inadvertently place themselves or the New Zealand Government at legal risk by their action or inaction.

Consultation with the Ministry of Foreign Affairs and Trade

Foreign policy objectives should be considered in the development and framing of cooperation arrangements with foreign partners. The Ministry of Foreign Affairs and Trade is to be consulted on any proposal to enter into an arrangement with a foreign jurisdiction or international organisation.

GCSB and NZSIS should also seek information from, and have regard to any information provided by, the Ministry of Foreign Affairs and Trade on the status of the bilateral

relationship with a country, and when weighing up factors related to a country's ratification of international human rights treaties and the human rights record of a particular country.

Written basis for new formal arrangements

All new bilateral or multilateral arrangements relating to cooperation and intelligence sharing with a foreign jurisdiction or overseas public authority must be referred to the Intelligence and Security Committee of Parliament for noting. Such arrangements should be recorded in writing.

GCSB and NZSIS must formulate standard terms for ad hoc cooperation and intelligence sharing, which are to be recorded in an internal policy. These terms are to establish consistent principles, standards and practices that will be applied to ad hoc cooperation and intelligence sharing activities to ensure that GCSB and NZSIS complies with New Zealand law and all human rights obligations recognised by New Zealand law. Those terms should be consistent with this MPS. These terms must be forwarded in draft to the Inspector-General of Intelligence and Security for comment and the final version referred to the Intelligence and Security Committee of Parliament for noting.

Training

All employees of GCSB and NZSIS must be provided training on all relevant law, policies and procedures in relation to the agencies' human rights obligations. This training should be provided for all existing employees and for new employees at induction, and whenever there are changes or updates to the policies and procedures, to ensure that at all times employees are aware of their obligations.

Compliance with State Services Code of Conduct

The Directors-General of GCSB and NZSIS must issue policies and procedures that reflect their agencies' obligations under the State Sector Act 1988.

Health and safety

All cooperation with overseas public authorities must be undertaken consistently with GCSB's and NZSIS's obligations under the Health and Safety at Work Act 2015.

Authorisation procedures

59. Within the context of this MPS, the responsible Minister must authorise the following:
 - The provision of any intelligence collected and any analysis of that intelligence to an overseas public authority
 - The provision of threat reports produced as a result of information assurance and cybersecurity activities to an overseas public authority
60. In determining whether to authorise the sharing of intelligence, analysis and threat reporting to an overseas public authority, the Minister must be satisfied that GCSB and NZSIS will be acting in accordance with New Zealand law including all human rights obligations recognised by New Zealand law.
61. The Minister will authorise the sharing of intelligence, analysis or threat reporting with a foreign partner on the basis of information provided to him or her by GCSB and NZSIS. This authorisation may be on a case-by-case basis or in the form of a broader standing authorisation. All requests for authorisation to share intelligence, analysis and threat reporting must include an assessment that addresses all factors listed in paragraphs 40 and 41 of this MPS, or describe how the agencies will make that assessment.

62. GCSB and NZSIS may seek a standing authorisation from the Minister that covers the sharing of specific classes of intelligence, analysis and threat reporting with certain overseas public authorities, or to share intelligence, analysis and threat reporting with a specific overseas public authority or with a particular country or group of countries. A request for a standing authorisation must include an assessment which considers the factors outlined in paragraphs 40 and 41 of this MPS, or describe how the agencies will make that assessment.
63. The Minister may specify conditions, limits or exclusions that are to apply in respect of the sharing of intelligence, analysis and threat reporting with an overseas public authority or country under a standing authorisation. The Minister will specify thresholds of risk at which decisions made under a standing authorisation must be referred back to the Minister. Standing authorisations must be reviewed when this MPS is amended, revoked or replaced, and if a human rights breach occurs or there are changes to domestic policy or practice in the country that may increase the likelihood of violations of human rights.
64. Where Ministerial authorisation for cooperation is not required, there must be clear levels of decision-making for each type of activity that may involve foreign cooperation, which must be documented. GCSB and NZSIS must have in place approval levels that are proportionate to the operational, reputational, legal and health and safety risks in cooperation with overseas public authorities: the greater the risk, the more senior the level of approval required. An assessment of the risk of human rights breaches connected with the foreign cooperation must be carried out, that includes the considerations outlined at paragraphs 40 and 41 of this MPS. Approval levels will include seeking authorisation from the Minister at agreed levels of risk, in particular where there is a reasonable basis for concern about a country's human rights record or that the cooperation in question might involve complicity in breaches of human rights.
65. The Directors-General of GCSB and NZSIS may authorise the passing of unsolicited intelligence indicating a credible national security risk to New Zealand or risk to the safety of New Zealanders that has been, or is suspected to have been, obtained through human right abuses committed by another party, to an enforcement agency. The Directors-General must consider the need to ensure public safety and the protection of life and property, and must be mindful that the reliability of such information is likely to be limited. If such information is passed on to an enforcement agency the responsible Minister and Inspector-General of Intelligence and Security must be informed as soon as practicable.

Duration of ministerial policy statement

66. This MPS will take effect from 28 September 2017 for a period of three years. The Minister who issued an MPS may, at any time, amend, revoke or replace the MPS.
67. At the time of issue of this MPS, the Inspector-General of Intelligence and Security is undertaking an Inquiry into possible New Zealand engagement with Central Intelligence Agency (CIA) detention and interrogation, 2001-2009, and current intelligence cooperation safeguards. When completed, the conclusions from that inquiry may give cause for the issuing Minister to review and reissue this MPS.

Ministerial Policy Statement issued by:



Hon Christopher Finlayson
Minister responsible for the Government Communications Security Service
Minister in charge of the New Zealand Security Intelligence Service

September 2017

Appendix One: New Zealand's Core Human Rights Obligations

Domestic law

To ensure that New Zealand meets its human rights obligations, GCSB and NZSIS employees must act consistently with domestic law under (but not limited to) the following statutes:

- New Zealand Bill of Rights Act 1990
- Human Rights Act 1993
- Privacy Act 1993
- Crimes Act 1961
- Crimes of Torture Act 1989
- Geneva Conventions Act 1958
- International Crimes and International Criminal Court Act 2000

International Obligations

New Zealand is a party to the following core international human rights instruments of the United Nations, and in doing so is bound by, and must regularly report on, the obligations within those instruments. Actions or activities that run contrary to the obligations within these instruments may constitute a human rights breach in the context of this MPS.

- The International Covenant on Civil and Political Rights
- Second Optional Protocol to the International Covenant on Civil and Political Rights
- Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
- The International Covenant on Economic, Social and Cultural Rights
- The Convention on the Elimination of All forms of Racial Discrimination
- Convention on the Rights of Persons with Disabilities
- Convention on the Elimination of all forms of Discrimination against Women
- Convention Relating the Status of Refugees
- Convention on the Rights of the Child

New Zealand is also a party to other international criminal and international humanitarian instruments, of which the following may be relevant in the context of GCSB and NZSIS cooperating with overseas public authorities:

- Rome Statute of the International Criminal Court
- Geneva Conventions and their protocols

New Zealand may also have other relevant obligations under customary international law.

Attachment B

Draft Overseas Cooperation MPS NGO Consultation Document

Consultation on the Review of the Ministerial Policy Statement on Cooperation of New Zealand Intelligence and Security Agencies (GCSB and NZSIS) with Overseas Public Agencies

On behalf of Hon Andrew Little, the Minister Responsible for the GCSB and the NZSIS, the Department of the Prime Minister and Cabinet is engaging in targeted consultation with relevant organisations to understand their views in the review of the Ministerial Policy Statement on cooperation of New Zealand intelligence and security agencies with overseas public agencies (Overseas Cooperation MPS).

Background

Ministerial Policy Statements (MPSs)

The [Intelligence and Security Act 2017](#) requires that the Minister responsible for the intelligence and security agencies issue MPSs in relation to the lawful activities of the agencies that set out any:

- procedures of an intelligence and security agency for authorising the carrying out of an activity relating to a matter
- protections that need to be in place in relation to the matter
- restrictions in relation to the matter.

The MPSs, reviewed and re-issued every three years, set out guiding principles that GCSB and NZSIS must apply when planning and carrying out these activities and identifies internal policies, procedures, consultation and training requirements in relation to each activity. The first MPSs were issued in 2017, and must be re-issued in 2020.

The Overseas Cooperation MPS

The Intelligence and Security Act requires the Minister responsible for the GSCB and NZSIS to issue guidance to these agencies on:

- Co-operating with an overseas public authority
- Providing advice and assistance to an overseas public authority

- Sharing intelligence with an overseas public authority.

The first [Overseas Cooperation MPS](#) was issued in 2017. The MPS provides guidance for the GCSB and NZSIS in relation to all forms of cooperation with overseas public authorities¹. It states that, when making decisions related to foreign cooperation the agencies must have regard to the principles of legality, human rights obligations, necessity, reasonableness and proportionality, protections for New Zealanders, information management, and oversight. It also sets out the procedures to authorise intelligence cooperation, assistance and sharing, and the protections and restrictions that need apply.

Inspector-General of Intelligence and Security's Report into whether NZSIS and GCSB had any connection to the CIA's "enhanced interrogation", detention and rendition programme in Afghanistan between 2001-2009.

In July 2019, the Inspector-General of Intelligence and Security (IGIS) released the report of her inquiry into whether New Zealand's intelligence and security agencies and personnel knew or were otherwise connected with, or risked connection to, the Central Intelligence Agency (CIA) detention and interrogation of detainees between 17 September 2001 and 22 January 2009 (accessible on the [IGIS website](#)).

In the IGIS' conclusions and recommendations, principal emphasis was placed on how the risks implicit in international intelligence-sharing and cooperation arrangements can best be anticipated and, where possible, be mitigated. The IGIS report recommended an early review of the Overseas Cooperation MPS² that consulted with relevant NGOs. The IGIS report noted this MPS had significant gaps regarding the clarity of limitations for information tainted by torture, and frameworks the agencies use in making decisions about when and how this information may or may not be used.

Consultation Focus Areas and Questions

There are three particular areas that DPMC is seeking to consult on, on behalf of the Minister regarding the Overseas Cooperation MPS:

- How to clearly articulate the responsibilities and obligations relating to torture within the MPS (including torture's non-derogable nature).
- Defining exceptional circumstances, public emergencies and/or credible risks to national security where 'tainted' information, i.e. information likely obtained by torture, might be passed to relevant law enforcement agencies.
- How agencies should weigh up competing rights and interests, such as loss of life, significant personal injury, critical national infrastructure, and/or property.

¹ An overseas public authority is defined by the MPS as meaning a foreign person or body that performs or exercises an public function, duty, or power conferred on that person or body by or under law.

² The MPS, when issued in 2017, acknowledged the IGIS' ongoing work and anticipated that following the release of the IGIS report a review would need to be undertaken.

To explore these focus areas, consultees are invited to discuss the following questions alongside any general comments they wish to make on the Overseas Cooperation MPS:

1. Noting the focus areas of this consultation, whether the Overseas Cooperation MPS is consistent with relevant and/or applicable domestic and international legal principles?
2. Whether the Overseas Cooperation MPS provides appropriate clarity, alongside the Intelligence and Security Act 2017, regarding:
 - a. guidance to an intelligence and security agency for authorising the carrying out of an activity relating to cooperation with overseas public authorities.
 - b. protections that need to be in place in relation to the matter
 - c. restrictions in relation to the matter.
3. What level of protection should be afforded to property in the interests of national security? Should there be different levels of protection afforded to different types of (for example, comparing the rights of personal property and critical national infrastructure)?
4. Regarding information received by agencies that is likely to have been obtained by torture:
 - a. What might define exceptional circumstances, public emergencies or a credible national security threat that would justify an agency passing on that information?
 - b. What considerations, guidance or safeguards should the agencies apply when passing on that information?

How to Respond

DPMC would appreciate written comments and responses to the questions above, if you wish to make them, to the questions above by [INSERT DATE]. Responses can be submitted via:

Email: [\[name.name\]@dpmc.govt.nz](mailto:[name.name]@dpmc.govt.nz)

Post: MPS Review
National Security Group
Department of the Prime Minister and Cabinet
Level 8 Executive Wing
Parliament Buildings
Wellington.

If you wish to discuss your submission, please contact us via the email address above.



Briefing

PROPOSED REVISED APPROACH FOR REVIEWING THE MINISTERIAL POLICY STATEMENTS

To Hon Andrew Little, Minister Responsible for the GCSB and NZSIS

Date	21/06/2020	Priority	Routine
Deadline	26/06/2020	Briefing Number	1920NSP/081

Purpose

This briefing seeks your agreement to a revised approach to reviewing and re-issuing the Ministerial Policy Statements (MPSs), given the impact of the COVID-19 response on the review.


Recommendations

1. **Note** that the Department of the Prime Minister and Cabinet is reviewing the MPSs on your behalf as part of the three year review cycle under the Intelligence and Security Act 2017 (the Act);
2. **Note** that the Act requires the MPSs to be reissued before September 2020;
3. **Note** that the pressures of the COVID-19 response has meant officials have been unable to progress the MPS review over the last three months;
4. **Agree** to the revised approach for reviewing the MPSs, including;
 - 4.1. Reviewing and reissuing six priority MPSs by September 2020;
 - 4.2. Reissuing the five remaining MPSs without review by September 2020; and
 - 4.3. Reviewing the remaining MPSs and reissuing all MPSs together by June 2021;

YES / NO

- 5. **Agree** to send the attached draft letter (Attachment A) to relevant ministers, outlining your proposed approach and inviting comment on any urgent concerns regarding the MPSs before they are reissued in September 2021; and YES / NO

- 6. **Agree** that we will engage the Inspector-General of Intelligence and Security on your behalf, outlining the proposed approach and invite comments on any urgent concerns regarding the MPSs before they are reissued in September 2021. YES / NO


Tony Lynch
**Deputy Chief Executive
National Security Group**

21.06.20
...../...../.....

Hon Andrew Little
**Minister Responsible for the GCSB
Minister Responsible for the NZSIS**

...../...../.....

Contact for telephone discussion if required:

Name	Position	Telephone	1st contact
Pip Swaney	Team Manager, Security and Intelligence Policy, National Security Group	s9(2)(a)	
Lynda Byrne	Principal Policy Advisor, Security and Intelligence Policy, National Security Group	s9(2)(a)	✓
Kaden Wilson	Policy Advisor, Security and Intelligence Policy, National Security Group	s9(2)(a)	

Minister's office comments:

- Noted
- Seen
- Approved
- Needs change
- Withdrawn
- Not seen by Minister
- Overtaken by events
- Referred to

PROPOSED REVISED APPROACH FOR REVIEWING THE MINISTERIAL POLICY STATEMENTS

Purpose

1. This briefing seeks your agreement to a revised approach to reviewing and re-issuing the Ministerial Policy Statements (MPS), given the impact of the COVID-19 response on the review.

We propose a revised, staged approach to reviewing the MPSs

2. You agreed in October 2019 that DPMC would lead the review and reissue of the MPSs on your behalf. The MPSs are required under the Intelligence and Security Act 2017 (the Act) to set out the responsible Minister's expectations of the GCSB and NZSIS and to provide guidance to the agencies on how certain lawful activities should be carried out. The Act requires the MPSs to be reissued by September 2020.
3. The Act does not specifically require the MPSs are reviewed prior to being reissued. However, as these are the first MPSs to be issued under the Act we proposed a detailed review to ensure they are workable, effective and did not have unforeseen consequences.
4. The response to COVID-19 has had a significant impact on the resources of DPMC and the agencies contributing to the review, which means we are unable to complete the review of all 11 MPSs by September 2020. Therefore we propose the following revised approach:

Timeline	Stage	MPSs (<i>current status</i>)
By September 2020	<ol style="list-style-type: none">1. Review and reissue six priority MPSs. <p><i>These six MPSs have either been identified by DPMC, GCSB and NZSIS as a priority for review (MPSs 4 and 6) or the review of the MPS is already underway</i></p>	<ol style="list-style-type: none">1. Conducting activities with an exemption from the land transport (Road User) rule 2004 (<i>ready to reissue</i>);2. Conducting surveillance in a public place (<i>MPS ready for Ministerial consultation – briefing attached</i>);3. Collecting information lawfully from persons without a warrant or authorisation (<i>inter-agency consultation</i>);4. Obtaining and using publicly available information (<i>inter-agency consultation</i>);5. Requesting information from agencies under section 121 of the Intelligence and Security Act 2017 (<i>Inter-agency consultation</i>); and6. Cooperation of New Zealand intelligence and security agencies (GCSB and NZSIS) with overseas public authorities (<i>Public consultation complete, Inter-agency consultation to begin</i>).

	<p>2. Reissue five remaining MPSs without review</p> <p><i>These five MPSs are not considered by DPMC, GCSB and NZSIS to have any urgent matters that need to be addressed prior to September 2020.</i></p>	<p>1. Acquiring, using and maintaining an assumed identity;</p> <p>2. Creating and maintaining a legal entity;</p> <p>3. Making false or misleading representations about being employed by an intelligence and security agency;</p> <p>4. Management of information obtained by an intelligence or security agency; and</p> <p>5. Providing information assurance and cyber security activities with consent.</p>
By June 2021	3. Review the five remaining MPSs	As above.
	4. Reissue all reviewed MPSs	All MPSs realigned to the same three year review timeline.

5. This proposal balances the requirements of the Act while effectively using the time available to address priorities we have identified in conversations with the GCSB and NZSIS. It will also re-align all MPSs to the same three year cycle for reissue, and has the added advantage of de-coupling the MPS review from future General Election timing.
6. We do not consider there are any risks with delaying the review of the five remaining MPSs by eight months. The GCSB and NZSIS have confirmed there are no immediate issues with the five MPSs for reissue that need addressing prior to September 2020.
7. Given the complexity of the issues within the *Cooperation of New Zealand intelligence and security agencies (GCSB and NZSIS) with overseas public authorities* MPS, there is a chance that the review of this MPS may not be completed by September 2020. We will keep your office informed if there are any delays with this review.

Next Steps

8. Given the requirement under the Act to consult with Ministers whose areas of responsibility includes an interest in an MPS, as well as the Inspector-General of Intelligence and Security (the IGIS), we recommend that, as a courtesy, you update them on the proposed approach. To support you in this, we propose that:
 - a) You send the attached draft letter (**Attachment A**) to relevant Ministers¹ outlining your approach, inviting urgent comments on MPSs that relate to their portfolio which will not be reviewed before September 2020; and

¹ Relevant Ministers include the Minister of Internal Affairs, Hon Tracey Martin; Minister of Police, Hon Stuart Nash; Minister of Transport, Hon Phil Twyford; Minister of Broadcasting, Communications and Digital Media, Hon Kris Faafoi; Minister of Customs, Hon Jenny Salesa; Minister of Defence, Hon Ron Mark.

- b) We engage the IGIS on your behalf (as part of our wider support on the review of the MPSs) and invite urgent comments on any MPS that will not be reviewed before September 2020.
- 9. We will also work with your office on decisions needed in relation to the six MPSs to be reviewed by September 2020.

Attachments:		
Attachment A:	Unclassified	Draft letter to relevant Ministers regarding revised MPS review timeline and seeking comments on urgent matters

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ATTACHMENT A

Hon [Minister Name]
[Role Title]
Parliament Buildings

Dear Minister [Name]

Revised Timeline for the Review and Reissue of the Ministerial Policy Statements

Sections 206 and 207 of the Intelligence and Security Act 2017 (the Act) requires the Minister(s) responsible for the intelligence and security agencies to issue Ministerial Policy Statements (MPSs) about certain lawful activities carried out by the GCSB and the NZSIS.

MPSs are a mechanism for the responsible Minister(s) to set expectations and provide guidance about the conduct of those activities. MPSs do not affect the lawfulness of the activities, but may be taken into account by the Inspector-General of Intelligence and Security when they are assessing the propriety of the agencies' activities. As the current Responsible Minister for both the GCSB and the NZSIS, I am responsible for reviewing and reissuing the MPSs.

The current 11 MPSs are required to be reissued within three years from the September 2017 date they took effect. Under section 212 of the Act I am required to consult with any Ministers of the Crown whose area of responsibility includes an interest in the proposed statement.

My intention had been to review and reissue all MPSs by September 2020. However, in light of the challenges with Government agencies responding to COVID-19 I have now reconsidered this approach. My priority now is to review six of the MPSs, and reissue the remaining five MPSs without review prior to the September 2020 statutory deadline.² This will mean that the following five MPSs will be reissued without review:

1. Acquiring, using and maintaining an assumed identity;
2. Creating and maintaining a legal entity;
3. Making false or misleading representations about being employed by an intelligence and security agency;
4. Management of information obtained by an intelligence or security agency; and
5. Providing information assurance and cyber security activities with consent.

There are not thought to be any issues with these MPSs that need to be addressed urgently. I plan to review and reissue these five MPSs by mid-2021. In the interim, if you consider there are any urgent matters that should be addressed prior to their reissue I recommend your officials make contact with my officials by 10 July 2020 to discuss.

Yours sincerely

Hon Andrew Little
Minister Responsible for the GCSB
Minister Responsible for the NZSIS

² For the six MPSs that will be reviewed before September 2020, I will consult you as appropriate for comment on MPSs relevant to your portfolio.



Briefing

CONSULTATION ON MINISTERIAL POLICY STATEMENT: CONDUCTING SURVEILLANCE IN A PUBLIC PLACE

To Hon Andrew Little, Minister Responsible for the GCSB and NZSIS

Date	22/06/2020	Priority	Routine
Deadline	26/06/2020	Briefing Number	1920NSP/054

Purpose


This briefing outlines the proposed changes to the draft Ministerial Policy Statement (MPS): *Conducting surveillance in a public place*, following its recent review. To support the Ministerial consultation that you are required to do under the Intelligence and Security Act 2017, it also attaches draft letters and a revised draft of the MPS, for forwarding to:

- Hon Stuart Nash, Minister of Police and Minister of Fisheries
- Hon Jenny Salesa, Minister of Customs
- Hon Damien O'Connor, Minister of Agriculture and Minister for Biosecurity.

Recommendations

1. **Note** that the Department of the Prime Minister and Cabinet is reviewing the Ministerial Policy Statements under the Intelligence and Security Act 2017 on your behalf
2. **Note** that we propose changes to the Ministerial Policy Statement: *Conducting surveillance in a public place*
3. **Note** that under the Intelligence and Security Act 2017, you are required to consult relevant Ministers as the Ministerial Policy Statements are reviewed and reissued
4. **Agree** to sign and forward the attached letters and draft Ministerial Policy Statement: *Conducting surveillance in a public place* to:
 - 4.1 Hon Stuart Nash, Minister of Police and Minister of Fisheries **YES / NO**
 - 4.2 Hon Jenny Salesa, Minister of Customs **YES / NO**

4.3 Hon Damien O'Connor, Minister of Agriculture and Minister for Biosecurity. YES / NO

 Tony Lynch Deputy Chief Executive National Security Group
22 06 20/...../.....

Hon Andrew Little Minister Responsible for the GCSB Minister Responsible for the NZSIS
...../...../.....

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Contact for telephone discussion if required:

Name	Position	Telephone	1st contact
Pip Swaney	Team Manager, Security and Intelligence Policy, National Security Group	s9(2)(a)	
Lynda Byrne	Principal Policy Advisor, Security and Intelligence Policy	s9(2)(a)	✓
Kaden Wilson	Policy Advisor, Security and Intelligence Policy	s9(2)(a)	

Minister's office comments:

- Noted
- Seen
- Approved
- Needs change
- Withdrawn
- Not seen by Minister
- Overtaken by events
- Referred to

CONSULTATION ON MINISTERIAL POLICY STATEMENT: CONDUCTING SURVEILLANCE IN A PUBLIC PLACE

Purpose

1. This briefing outlines the proposed changes to the draft Ministerial Policy Statement: *Conducting surveillance in a public place*, following its recent review. To support the Ministerial consultation that you are required to do under the Intelligence and Security Act 2017, it also attaches draft letters and a revised draft of the Ministerial Policy Statement (MPS) for forwarding to:
 - Hon Stuart Nash, Minister of Police and Minister of Fisheries
 - Hon Jenny Salesa, Minister of Customs
 - Hon Damien O'Connor, Minister of Agriculture and Minister for Biosecurity

Review of the MPS

2. To review this MPS we worked with NZSIS on whether the MPS provided clear and appropriate guidance in relation to conducting surveillance in a public place. We looked at how the NZSIS had incorporated the MPS into its operations and whether there were any problems with the MPS. We also consulted with:
 - The Acting Inspector-General of Intelligence and Security
 - The Privacy Commissioner
 - The Ministry of Justice
 - New Zealand Police
 - New Zealand Customs
 - The Ministry for Primary Industries.

Proposed changes to the MPS

3. Key feedback on this MPS was that generally it provided clear guidance to the NZSIS, but there were parts that caused confusion and could be made clearer. As a result we propose the following changes:
 - a) Revise the "use of equipment" section. The NZSIS reported that this section created confusion as to what type of equipment or technology could be used when conducting surveillance in a public place without a warrant. This resulted in avoidable checks with the legal team and sometimes ceasing operations while these checks were made. We have renamed this section "use of technology" and added language that emphasises only technology that enhances imagery already within public view are to be used.
 - b) Add further context on when NZSIS might conduct surveillance in a public place, including when the NZSIS is undertaking preliminary inquiries.
 - c) Revise the section on legality to make it clearer when surveillance in a public place is clearly lawful.

- d) Add further context to the “respect for privacy” principle. We have expanded on the separate factors to be considered when assessing privacy aspects, such as the location and duration of the surveillance, the observation of third parties not under surveillance, and the nature of activities being observed. The discussion on the preference to use less intrusive means where possible was also strengthened.
 - e) Simplify the language on implied licence. Implied licence is a difficult concept in respect of conducting surveillance in a public place, so we have simplified this language and NZSIS will provide more guidance in their internal operational documentation.
 - f) Under the “Matters to be reflected in internal policies and procedures” section, we have decoupled the “Communications protected by privilege” from the “sensitive category individuals”. This is to recognise the unique characteristics of each group that should be considered by NZSIS’s internal procedures and policies.
 - g) Revise the use of examples within the MPS. The previous version of the MPS included examples that were repetitive and sometimes not relevant to the context. We have streamlined the examples and used more relevant examples provided by the operational teams in NZSIS.
 - h) Minor changes to reduce repetition and improve readability.
4. The revised draft Ministerial Policy Statement: *Conducting surveillance in a public place*, with highlighted changes, is attached (**Attachment A**). A clean version of the MPS is also attached (**Attachment B**).

The Act requires you to consult with relevant Ministers before reissuing the revised MPS

- 5. Under Section 212 of the Intelligence and Security Act 2017 (the Act), you are required to consult with any other Minister of the Crown whose area of responsibility includes an interest in the proposed MPS.
- 6. In this case, we recommend you consult with Hon Stuart Nash – Minister of Police and Minister of Fisheries, Hon Jenny Salesa – Minister of Customs, and Hon Damien O’Connor – Minister of Agriculture and Minister for Biosecurity. These portfolios were consulted on the original MPS as their respective agencies conduct surveillance in public places, and to help ensure consistency in this activity across government.
- 7. Draft letters to these Ministers are attached as Attachments C, D and E, for your signature. You may also wish to consider the revised MPS in your capacity as Minister of Justice.

Next Steps

- 8. Once you receive any feedback on the MPS from Ministerial consultation, we will support you in adapting the MPS to reflect the comments.
- 9. Revision of the Ministerial Policy Statement: *Conducting surveillance in a public place* is part of a programme of work to review all eleven MPSs. We have prepared an accompanying briefing (1920NSP/081) seeking your agreement to a revised approach to reviewing the MPS given the delays caused by the COVID-19 response.

Attachments:		
Attachment A:	Unclassified	Draft revised Ministerial Policy Statement: <i>Conducting Surveillance Public Surveillance</i> – marked-up version
Attachment B:	Unclassified	Draft revised Ministerial Policy Statement: <i>Conducting Surveillance Public Surveillance</i> – clean version
Attachment C:	Unclassified	Letter to Hon Stuart Nash, Minister of Police and Minister of Fisheries
Attachment D:	Unclassified	Letter to Hon Jenny Salesa, Minister of Customs
Attachment E:	Unclassified	Letter to Hon Damien O'Connor, Minister of Agriculture and Minister for Biosecurity

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Attachment A

Draft revised Ministerial Policy Statement: Conducting surveillance in a public place (*marked-up version*)

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Attachment B

Draft revised Ministerial Policy Statement: Conducting surveillance in a public place (*clean version*)

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Attachment C

Hon Stuart Nash
Minister of Police
Minister of Fisheries
Parliament Buildings

Dear Minister Nash

Consultation on ministerial policy statement: Conducting Surveillance in a Public Place

I enclose for your comment a draft of the revised Ministerial Policy Statement: *Conducting Surveillance in a Public Place* by intelligence agencies under subpart 2 of Part 3 of the Intelligence and Security Act 2017 (the Act).

Sections 206 and 207 of the Act require the Minister(s) responsible for the intelligence and security agencies to issue Ministerial Policy Statements (MPSs) about certain lawful activities carried out by the GCSB and the NZSIS. The MPSs are required to be reviewed within three years from the date they take effect.

MPSs are a mechanism for the responsible Minister(s) to set expectations and provide guidance about the conduct of those activities. MPSs do not affect the lawfulness of the activities, but may be taken into account by the Inspector-General of Intelligence and Security when they are assessing the propriety of the agencies' activities. As the current Responsible Minister for both the GCSB and the NZSIS, I am responsible for reviewing and reissuing the MPSs.

Under section 212 of the Act I am required to consult with any Ministers of the Crown whose area of responsibility includes an interest in the proposed statement. In this case, I seek your comments as the MPS is relevant to your portfolio responsibilities both as Minister of Police and as Minister of Fisheries. The agencies within these portfolios also conduct surveillance in public places and it is important there is consistency across government in undertaking this activity.

The Department of the Prime Minister and Cabinet is undertaking a review of the MPSs on my behalf. In relation to this particular MPS, in addition to the NZSIS, DPMC has consulted with the Inspector-General of Intelligence and Security, the Ministry of Justice, Ministry for Primary Industries, New Zealand Police, New Zealand Customs Service and the Privacy Commissioner. The consultation has shown that while overall the MPS provides clear guidance to the NZSIS in conducting surveillance in a public place, parts of the MPS caused confusion and could be made clearer. The attached MPS highlights the proposed changes.

If you have any comments, I would be grateful to receive these by 10 July 2020.

Yours sincerely

Hon Andrew Little
Minister Responsible for the GCSB
Minister Responsible for the NZSIS

Attachment: Draft Ministerial Policy Statement: Conducting surveillance in a public place (*marked-up version*)

Attachment: Draft Ministerial Policy Statement: Conducting surveillance in a public place (*clean version*)

Attachment D

Hon Jenny Salesa
Minister of Customs
Parliament Buildings

Dear Minister Salesa

Consultation on ministerial policy statement: Conducting Surveillance in a Public Place

I enclose for your comment a draft of the revised Ministerial Policy Statement: *Conducting Surveillance in a Public Place* by intelligence agencies under subpart 2 of Part 3 of the Intelligence and Security Act 2017 (the Act).

Sections 206 and 207 of the Act require the Minister(s) responsible for the intelligence and security agencies to issue Ministerial Policy Statements (MPSs) about certain lawful activities carried out by the GCSB and the NZSIS. The MPSs are required to be reviewed within three years from the date they take effect.

MPSs are a mechanism for the responsible Minister(s) to set expectations and provide guidance about the conduct of those activities. MPSs do not affect the lawfulness of the activities, but may be taken into account by the Inspector-General of Intelligence and Security when they are assessing the propriety of the agencies' activities. As the current responsible Minister for both the GCSB and the NZSIS, I am responsible for reviewing and reissuing the MPSs.

Under section 212 of the Act I am required to consult with any Ministers of the Crown whose area of responsibility includes an interest in the proposed statement. In this case, I seek your comments as the MPS is relevant to your portfolio responsibilities as Minister of Customs. NZ Customs also conducts surveillance in public places and it is important there is consistency across government in undertaking this activity.

The Department of the Prime Minister and Cabinet is undertaking a review of the MPSs on my behalf. In relation to this particular MPS, in addition to the NZSIS, DPMC has consulted with the Inspector-General of Intelligence and Security, the Ministry of Justice, Ministry for Primary Industries, New Zealand Police, New Zealand Customs Service and the Privacy Commissioner. The consultation has shown that while overall the MPS provides clear guidance to the NZSIS in conducting surveillance in a public place, parts of the MPS caused confusion and could be made clearer. The attached MPS highlights the proposed changes.

If you have any comments, I would be grateful to receive these by 10 July 2020.

Yours sincerely

Hon Andrew Little
Minister Responsible for the GCSB
Minister Responsible for the NZSIS

Attachment: Draft Ministerial Policy Statement: Conducting surveillance in a public place (*marked-up version*)

Attachment: Draft Ministerial Policy Statement: Conducting surveillance in a public place (*clean version*)

Attachment E

Hon Damien O'Connor
Minister of Agriculture
Minister for Biosecurity
Parliament Buildings

Dear Minister O'Connor

Consultation on ministerial policy statement: Conducting Surveillance in a Public Place

I enclose for your comment a draft of the revised Ministerial Policy Statement: *Conducting Surveillance in a Public Place* by intelligence agencies under subpart 2 of Part 3 of the Intelligence and Security Act 2017 (the Act).

Sections 206 and 207 of the Act require the Minister(s) responsible for the intelligence and security agencies to issue Ministerial Policy Statements (MPSs) about certain lawful activities carried out by the GCSB and the NZSIS. The MPSs are required to be reviewed within three years from the date they take effect.

MPSs are a mechanism for the responsible Minister(s) to set expectations and provide guidance about the conduct of those activities. MPSs do not affect the lawfulness of the activities, but may be taken into account by the Inspector-General of Intelligence and Security when they are assessing the propriety of the agencies' activities. As the current Minister for both the GCSB and the NZSIS, I am responsible for reviewing and reissuing the MPSs.

Under section 212 of the Act I am required to consult with any Ministers of the Crown whose area of responsibility includes an interest in the proposed statement. In this case, I seek your comments as the MPS is relevant to your portfolio responsibilities both as Minister of Agriculture and Minister for Biosecurity. The agencies within these portfolios also conduct surveillance in public places and it is important there is consistency across government in undertaking this activity.

The Department of the Prime Minister and Cabinet is undertaking a review of the MPSs on my behalf. In relation to this particular MPS, in addition to the NZSIS, DPMC has consulted with the Inspector-General of Intelligence and Security, the Ministry of Justice, Ministry for Primary Industries, New Zealand Police, New Zealand Customs Service and the Privacy Commissioner. The consultation has shown that while overall the MPS provides clear guidance to the NZSIS in conducting surveillance in a public place, parts of the MPS caused confusion and could be made clearer. The attached MPS highlights the proposed changes.

If you have any comments, I would be grateful to receive these by 10 July 2020.

Yours sincerely

Hon Andrew Little
Minister Responsible for the GCSB
Minister Responsible for the NZSIS

Attachment: Draft Ministerial Policy Statement: Conducting surveillance in a public place (*marked-up version*)

Attachment: Draft Ministerial Policy Statement: Conducting surveillance in a public place (*clean version*)



Briefing


REVIEW OF THE MINISTERIAL POLICY STATEMENTS – REVISED TIMING

To Hon Andrew Little, Minister Responsible for the GCSB and NZSIS

Date	28/08/2020	Priority	Routine
Deadline	13/09/2020	Briefing Number	2021NSP/010

Recommendations

1. **Note** that, in July 2020, you agreed to a revised approach to reviewing and reissuing the Ministerial Policy Statements, given the significant impact of the COVID-19 response on the review;
2. **Note** that there have been further delays, meaning we are unable to complete the review of six of the 11 MPSs by September 2020;
3. **Agree** to reissue the MPSs as they stand prior to 28 September 2020; **YES / NO**
4. **Agree** to the MPSs being reviewed and reissued prior to June 2021. **YES / NO**


 Tony Lynch
 Deputy Chief Executive
 National Security Group

28/08/20
/...../.....

Hon Andrew Little
 Minister Responsible for the GCSB
 Minister Responsible for the NZSIS

...../...../.....

Contact for telephone discussion if required:

Name	Position	Telephone	1st contact
Pip Swaney	Team Manager, Security and Intelligence Policy, National Security Group	s9(2)(a)	
Lynda Byrne	Principal Policy Advisor, Security and Intelligence Policy, National Security Group	s9(2)(a)	✓

Minister's office comments:

- Noted
- Seen
- Approved
- Needs change
- Withdrawn
- Not seen by Minister
- Overtaken by events
- Referred to

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REVIEW OF THE MINISTERIAL POLICY STATEMENTS – REVISED TIMING

Purpose

1. This briefing seeks your agreement to a revised timeline for reviewing the Ministerial Policy Statements (MPSs).

The Ministerial Policy Statements are required to be re-issued by September 2020

2. The Department of the Prime Minister and Cabinet, working closely with GCSB and NZSIS, is leading the review of the MPSs on your behalf. There are 11 MPSs which set out the responsible Minister's expectations and provide guidance to the GCSB and NZSIS on how certain lawful activities should be carried out.
3. The Intelligence and Security Act 2017 (the Act) requires the MPSs to be reissued by 28 September 2020. While the Act does not specifically require the MPSs to be reviewed prior to being reissued, given these were the first MPSs to be issued under the Act we proposed a detailed review to ensure the MPSs were workable and effective.

The response to COVID-19 meant the review was delayed

4. In July 2020, you agreed to a revised approach to reviewing and reissuing the MPSs, given the significant impact of the COVID-19 response on the review [1920NSP/081 refers]. At that time we had proposed to:
 - By end-September 2020:
 - review and reissue six MPSs;
 - reissue the five remaining MPSs without review.
 - By end-June 2021:
 - Review the remaining five MPSs;
 - Reissue all reviewed MPSs (so all MPSs were aligned to the same three-year review period).
5. At this stage, we have completed the review of two MPSs. There have been further delays with the review of the other four MPSs we had hoped to complete by September. As highlighted in the previous briefing, these are the more complex MPSs and it has taken time to resolve a number of issues, alongside competing priorities within each of the responsible agencies. This means we are not able to meet the statutory requirement to consult with Ministers and the Inspector-General of Intelligence and Security (IGIS) in the required timeframe.
6. In addition, the IGIS is reviewing GCSB and NZSIS's open source activities, including how the agencies apply the guidance in the relevant MPS ('Obtaining and using publicly

available information'). We would like to wait for the outcome of that review (expected to be completed in October 2020) before finalising the review of this MPS.

7. Re-issuing the MPSs at a later date will also enable us to incorporate any recommendations from the Royal Commission of Inquiry into the Attack on Christchurch Mosques.

We now propose to review and re-issue the Ministerial Policy Statements by June 2021

8. GCSB, NZSIS and the IGIS have confirmed there are no immediate issues that need addressing prior to the MPSs being reissued by end-September 2020, as required by the ISA. We are still on track to review the remaining nine MPSs and to reissue all 11 MPSs by June 2021.
9. We do not consider there are any risks with reviewing and reissuing the MPSs by June 2021. Reissuing all MPSs together at this time has the advantage of decoupling the MPS reviews with future General Election timings.

However we intend to re-issue the MPS on Overseas Cooperation prior to June 2021

10. The one exception to this timing is the MPS on 'Cooperation of New Zealand intelligence and security agencies (GCSB and NZSIS) with overseas public authorities', which we are currently reviewing and intend to re-issue as soon as possible.
11. The IGIS has recommended early review of this MPS in the report *Inquiry into possible New Zealand intelligence and security agencies' engagement with the CIA detention and interrogation programme* (the Senate Report). The agencies are seeking the Overseas Cooperation MPS review to be finalised prior to their review of the Joint Policy Statement on Human Rights Risk Management, which was also a recommendation in the Senate Report.

Next steps

12. If you agree with the revised approach set out in this briefing, we will provide you with the 11 MPSs to reissue prior to end-September 2020.
13. We will work with your office on decisions needed in relation to the ongoing review.

Consultation

14. GCSB and NZSIS were consulted on this briefing and have given their commitment to completing the review in the revised timeframe. The Office of the IGIS has been consulted on the revised timing and has confirmed they can manage their resourcing to support the timing of the review.

Briefing

CONSULTATION ON MINISTERIAL POLICY STATEMENT: COOPERATING WITH OVERSEAS PUBLIC AUTHORITIES

To Hon Andrew Little, Minister Responsible for the GCSB and NZSIS

Date	18/12/2020	Priority	Routine
Deadline	18/01/2021	Briefing Number	2021NSP/030

Purpose

This briefing outlines the proposed changes to the draft Ministerial Policy Statement (MPS): *Cooperating with overseas public authorities*, following its recent review.

To support the Ministerial consultation you are required to do under the Intelligence and Security Act 2017, it also attaches draft letters and a revised draft of the MPS, for forwarding to:

- Hon Nanaia Mahuta, Minister of Foreign Affairs;
- Hon Poto Williams, Minister of Police;
- Hon Kris Faafoi, Minister of Justice and Minister of Immigration;
- Hon Peeni Henare, Minister of Defence;
- Hon Meka Whaitiri, Minister of Customs.

Recommendations

1. **Approve** the draft revised Ministerial Policy Statement (MPS): Cooperating with overseas public authorities (Attachment B) for ministerial consultation; **YES / NO**

2. **Agree** to provide additional guidance to the Directors-General on the following matters via a letter when the MPS is reissued:

2.1 s6(a)  **YES / NO**

2.2 s6(a) [Redacted] YES / NO

3. **Note** that under the Intelligence and Security Act 2017, you are required to consult relevant Ministers as the Ministerial Policy Statements are reviewed and reissued;

4. **Sign** and forward the attached letters and draft MPS to:

4.1 Hon Nanaia Mahuta, Minister of Foreign Affairs; YES / NO

4.2 Hon Poto Williams, Minister of Police; YES / NO

4.3 Hon Kris Faafoi, Minister of Justice and Minister of Immigration; YES / NO

4.4 Hon Peeni Henare, Minister of Defence; YES / NO

4.5 Hon Meka Whaitiri, Minister of Customs. YES / NO



Tony Lynch
**Deputy Chief Executive
 National Security Group
 Department of the Prime Minister and
 Cabinet**

...../...../.....

Hon Andrew Little
**Minister Responsible for the GCSB
 Minister Responsible for the NZSIS**

...../...../.....

Contact for telephone discussion if required:

Name	Position	Telephone	1st contact
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Minister's office comments:

- Noted
- Seen
- Approved
- Needs change
- Withdrawn
- Not seen by Minister
- Overtaken by events
- Referred to

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CONSULTATION ON MINISTERIAL POLICY STATEMENT: COOPERATING WITH OVERSEAS PUBLIC AUTHORITIES

Purpose

1. This briefing outlines the proposed changes to the *draft Ministerial Policy Statement (MPS): Cooperating with overseas public authorities*, following its recent review. To support the Ministerial consultation you are required to do under the Intelligence and Security Act 2017 (the Act), it also attaches draft letters and a revised draft of the MPS, for forwarding to:
 - Hon Nanaia Mahuta, Minister of Foreign Affairs;
 - Hon Poto Williams, Minister of Police;
 - Hon Kris Faafoi, Minister of Justice and Minister of Immigration;
 - Hon Peeni Henare, Minister of Defence;
 - Hon Meka Whaitiri, Minister of Customs.

Executive Summary

2. The Department of Prime Minister and Cabinet, working closely with GCSB and NZSIS, has reviewed the *MPS: Cooperating with overseas public authorities* (the overseas cooperation MPS) on your behalf.
3. We consulted widely on this MPS, with government agencies, the Inspector-General of Intelligence and Security (IGIS), the Human Rights Commission, Office of the Privacy Commissioner, and NGOs. As a result we propose a number of changes to the MPS, including:
 - restructuring it to include a 'cover sheet' that sets out the overarching purpose of the MPSs which will be common across all 11 MPSs
 - clarifying it only applies to lawful activity
 - including a human rights risk assessment framework
 - providing consistency in assessing risk
 - adding detail on the exceptional circumstances in which the agencies can use intelligence where they know or assess the intelligence was obtained through a serious human rights breach.
4. The revised MPS is attached, for you to consult with relevant Ministerial colleagues as you are required to do under the Act. Once you receive any feedback from this consultation, we will adapt the MPS to reflect the comments. The MPS can then be finalised and reissued. At that point, a copy of the MPS must be provided to the Intelligence and Security Committee (ISC), as per section 207(2) of the Act.

DPMC is reviewing the MPSs on your behalf

5. Under the Act the MPSs are required to be reissued every three years. DPMC, working closely with GCSB and NZSIS, is reviewing the MPSs on your behalf.
6. Due to disruptions caused by COVID-19, the work in preparation for the Royal Commission of Inquiry into the Christchurch attacks and other competing priorities, the MPSs were reissued without review in September 2020. We are now aiming to review and reissue all MPSs prior to June 2021.

Review of the overseas cooperation MPS

7. The purpose of the overseas cooperation MPS is to set out your expectations, as the responsible Minister, for how the GCSB and NZSIS properly cooperate with overseas public authorities. The MPS provides a framework for decision-making and best practice conduct for the agencies when undertaking foreign cooperation – which includes providing advice and assistance, and sharing intelligence.
8. Given the significant focus on human rights in the MPS, there has been a strong level of interest in the review from other government agencies, the Inspector-General of Intelligence and Security (IGIS) and NGOs who promote human rights. To reflect this level of interest, the review has been comprehensive and in-depth, with levels of consultation and engagement beyond that of the other MPSs we are reviewing on your behalf.

We worked closely with GCSB and NZSIS

9. We worked closely with the policy, legal and operational branches of GCSB and NZSIS on the review of this MPS to consider:
 - whether the MPS provided clear guidance to the agencies when cooperating with overseas public authorities;
 - how the MPS was incorporated into the operations of the agencies and whether there were any impediments to the operationalisation of the MPS;
 - any unintended consequences, or other issues, including on the effectiveness and efficiency of the agencies; and
 - the comments and views of relevant oversight bodies, including the Inspector-General of Intelligence and Security (IGIS) and Government agencies.
10. As we revised the MPS we consistently checked in with the agencies against these points, to ensure any revisions were operationally workable. GCSB and NZSIS were given the opportunity to respond to comments made by other parties during the consultation process.

We considered the recommendations of the IGIS report

11. The 2019 IGIS report: *Inquiry into possible New Zealand intelligence and security agencies' engagement with the CIA detention and interrogation programme 2001-2009* (the IGIS report) made several recommendations to address gaps the IGIS identified in this MPS.
12. The IGIS report stated that the MPS should unambiguously set out New Zealand's legal obligations relating to torture and complicity in torture. This was not able to be achieved

when the MPS was developed in 2017. The Ministry of Foreign Affairs and Trade (MFAT) has since issued a legal opinion to clarify New Zealand's obligation, at international law, not to be complicit in an internationally wrongful acts of another State. This opinion informed the review of the MPS, however the guidance in the MPS sets a higher policy threshold than the legal threshold of complicity.

13. The IGIS report also identified the following gaps in the 2017 MPS:

- it does not state that the prohibition of torture is non-derogable (ie it cannot be lifted in any circumstance);
- it does not specify the circumstances in which the use of 'tainted' information might be justified;
- it accorded property primacy over protecting human rights;
- the threats or risks that, when identified, would allow the agencies to share information through human rights abuses, lack clarity;
- there is inconsistency in whether 'tainted' information may or should be passed to relevant law enforcement agencies;
- it is unclear what 'unsolicited' means in the context of an intelligence-sharing relationship and why the distinction is necessary; and
- the MPS refers to situations where intelligence that indicates a 'credible' security risk is suspected to have been gained through torture, which does not reconcile with the statement that information gained by torture is inherently unreliable.

14. We worked closely with the Office of the IGIS as we revised the MPS, to check that the revisions sufficiently addressed the recommendations made in the IGIS Report, and to seek their views on whether the MPS provided appropriate guidance to the agencies from the perspective of their oversight role. This consultation undertaken on your behalf has fulfilled your obligation under the Act to consult the IGIS when reviewing and updating the MPS. The IGIS is satisfied with the current draft, thinks it is an improvement from the 2017 MPS, and considers we have addressed all of the concerns their office has raised.

We consulted with key NGOs

15. One of the recommendations from the IGIS report was to consult with key NGOs on the revised MPS. You agreed that we would consult with a small number of organisations that promote and defend human rights, and understand New Zealand's international human rights obligations [1920NSP/031 refers]. Earlier in the year, we contacted five organisations¹ to seek their feedback on the MPS, including in particular:

- how to clearly articulate human rights responsibilities and obligations within the MPS;
- defining exceptional circumstances at which information likely obtained by torture might be passed to law enforcement agencies;

¹ Amnesty International, Privacy International, New Zealand Council for Civil Liberties, Human Rights Foundation and the Privacy Foundation

- whether the MPS was consistent with domestic and international human rights obligations; and
 - whether the MPS provided appropriate clarity regarding guidance, protections and restrictions in cooperating with overseas public authorities.
16. The Privacy Foundation was the only organisation that responded to the consultation document. The other organisations appreciated being consulted, and either had no comments or were unable to prioritise providing feedback, including after the deadline was extended due to COVID-19.
17. The Privacy Foundation made a number of recommendations related to the adequacy of the MPS in relation to human rights obligations, improvements to provide more clarity on the guidance, safeguards and restrictions needed to for cooperation to occur, and suggestions on the level of protection afforded to property in connection with national security. This feedback was reflected in the revised draft of the MPS.

We also consulted key government departments

18. We also consulted with the following agencies with an interest in this MPS:
- The Ministry of Foreign Affairs and Trade;
 - The Ministry of Justice;
 - The Privacy Commissioner;
 - The Human Rights Commission;
 - New Zealand Police;
 - New Zealand Customs;
 - The Ministry of Defence;
 - The New Zealand Defence Force.
19. We consulted with these agencies on the first revised draft of the MPS. These agencies were also given an opportunity to provide feedback on a second revised draft. If any feedback was not taken on board, we provided justification for this that agencies have accepted.
20. Overall, agencies noted that this review has significantly improved the MPS. The Human Rights Commission (HRC) is the main agency that provided feedback we did not incorporate into the draft MPS:
- They suggested the definition of 'overseas public authorities' be expanded to include private contractors and agents of these authorities. We did not think this was necessary as the definition in the Act includes any person working for the public authority.
 - They suggested authorisation for overseas cooperation is provided by an external independent body. This is beyond the scope of the MPS review and would require legislative change.

- Both the HRC and the IGIS recommended that the agencies' internal human rights policy should be made public. DPMC's view is that the agencies' internal policy needs to provide detailed and frank guidance to staff on assessing human rights risk. If the agencies draft their internal policies with the intention of those documents becoming public, this would detract from their primary purpose and mean they are less useful to staff.
- HRC suggested requiring the agencies to develop a policy to state how they will monitor partner countries, and require them to review certain countries every six months. The MPS sets out the matters the agencies need to consider when reviewing the human rights practices of a country. Requiring the agencies to review every six months has unjustified resource implications.

21. Our understanding is that, apart from these matters, there are no outstanding substantial differences in views.

Proposed changes to the MPS

22. The following table sets out the substantive changes to the MPS. There are also a number of more minor changes, including to the structure, to improve readability and consistency and reduce repetition.

Table One: Substantive changes to the MPS

Change	Recommended by
1. The structure has been changed to include a cover sheet (or website landing page) which will become common across all of the MPSs. This sets out the overarching purpose of the MPSs, so each individual MPS focuses on the specific activity (in this case overseas cooperation)	DPMC, GCSB, NZSIS, IGIS
2. The MPS now makes it clearer that it only applies to lawful activity, and is not a framework for what is or is not lawful. The legality principle has been removed and it is instead set out in the scope section that it only applies to lawful activity and if in doubt, legal advice should be sought. This will also now be common across all MPSs (as appropriate).	MFAT, IGIS, MoJ, GCSB, NZSIS
3. The MPS now includes a risk assessment framework to be reflected in the agencies' internal policies to ensure the agencies' cooperation will not result in a real risk of contributing to, or being complicit in, a breach of human rights. This has been informed by MFAT's advice and the IGIS report – which were both developed since 2017.	IGIS
4. Consistent language is used throughout on the threshold of assessing risk – where there is a 'real risk' of contributing to a human rights breach.	IGIS, DPMC, GCSB, NZSIS
5. It now includes detail of the exceptional circumstances in which agencies can use intelligence where they know or assess there was a real risk that the intelligence was obtained through a serious human rights breach. That is, where the use of the intelligence is necessary to prevent loss of life, significant personal injury or a threat to critical national infrastructure.	IGIS, Privacy Foundation, GCSB, NZSIS

6. Added in text to address situations where cooperation may result in a person being sentenced to death.	MFAT, NZ Customs
7. The MPS now states that the prohibition of torture is non-derogable.	IGIS, Privacy Foundation
8. The MPS now includes criteria that the agencies need to take into account when considering whether to refer a written arrangement to the Intelligence and Security Committee (ISC).	DPMC, IGIS, GCSB, NZSIS

When the MPS is reissued, we recommend two matters are clarified

23. There are two further matters in which the agencies sought clarification in the review of this MPS which require further explanation:

a. s6(a)



b. The guidance in the current MPS on when the agencies should refer a written arrangement with an overseas public authority to the ISC is open to interpretation, and as a result no arrangements have been referred in the past three years. We have therefore included criteria to assist in the determination of what arrangements should be referred to the ISC, namely where the arrangement:

- is likely to have significant implications for New Zealand's foreign policy or international relations;
- results in a significant change to the agencies' priorities or intelligence focus;
- involves significant expenditure of funds; and / or
- is seen to be inconsistent with Government objectives or priorities.

s6(a)



The agencies will apply the revised MPS criteria for referral of arrangements retrospectively to written arrangements entered into since 2017.

24. If you wish to provide additional guidance to the agencies on these matters, DPMC will provide suggested wording for inclusion in the letters to the Directors-General when the MPS is reissued.

Next Steps

25. If you agree with the proposed revisions, we recommend you sign the attached letters to send to your ministerial colleagues, as required under the Act.
26. The ministerial consultation is not urgent and you may choose to consult in early 2021.
27. Once you receive any feedback from your consultation, we will adapt the MPS to reflect the comments. The MPS can then be finalised and reissued. The Act then requires you to provide a copy to the ISC.

Attachments:		
Attachment A:	Unclassified	Draft revised Ministerial Policy Statement: <i>Cooperating with overseas public authorities</i>
Attachment B	Unclassified	2017 version of Ministerial Policy Statement: <i>Cooperating with overseas public authorities</i>
Attachment C:	Unclassified	Letter to Hon Nanaia Mahuta, Minister of Foreign Affairs
Attachment D:	Unclassified	Letter to Hon Poto Williams, Minister of Police
Attachment E:	Unclassified	Letter to Hon Kris Faafoi, Minister of Justice and Minister of Immigration
Attachment F:	Unclassified	Letter to Hon Peeni Henare, Minister of Defence
Attachment G:	Unclassified	Letter to Hon Meka Whaitiri, Minister of Customs

ATTACHMENT A

DRAFT REVISED MINISTERIAL POLICY STATEMENT: COOPERATING WITH OVERSEAS PUBLIC AUTHORITIES

Ministerial Policy Statements

1. Ministerial Policy Statements (MPSs) are statements issued by the Minister Responsible for the GCSB and NZSIS under section 206 and 207(1) of the Intelligence and Security Act 2017 (‘the Act’).

MPSs provide guidance to GCSB and NZSIS on certain lawful activities

2. MPSs provide guidance to GCSB and NZSIS (also called ‘the agencies’) on lawful activities under the Act. They do not act as legal authorisations for these activities but set out the Minister’s expectations of how the activities covered by the MPS should be properly carried out and any protections or restrictions in relation to the activity. Activities which are unlawful may only be carried out to the extent that they can be authorised under an intelligence warrant.
3. Every employee making decisions or taking any action in relation to the matters covered by the MPSs must consider and should be able to explain how they had regard to the MPS. This might include an explanation of the consideration of any relevant internal policy or procedures that reflect the MPS. The Directors-General of the GCSB and NZSIS are responsible for ensuring each MPS is reflected in their agency’s internal policies and procedures. If any action is taken that is inconsistent with the MPS, employees must be able to explain why that action was taken.

They are also considered by the Inspector-General of Intelligence and Security when conducting an inquiry or review

4. MPSs are relevant to the oversight of the agencies by the Inspector-General of Intelligence and Security in the exercise of their propriety jurisdiction. When conducting an inquiry or review, the Inspector-General of Intelligence and Security must take account of any relevant MPS and the extent to which an agency has complied with it.

And they assist in increasing transparency with the New Zealand public

5. While the primary purpose of the MPSs is to provide guidance to the agencies on their lawful activities, they also provide the public with information on how and why the agencies carry out these activities to help keep New Zealand secure.

Each of the activities covered by the MPSs enable the agencies to perform their statutory functions

6. The Act sets the principal objectives of GCSB and NZSIS, which are to contribute to:
 - The protection of New Zealand's national security;
 - The international relations and well-being of New Zealand; and
 - The economic well-being of New Zealand.
7. The GCSB and NZSIS meet these objectives through the performance of their statutory functions, namely:
 - Intelligence collection and analysis;
 - Protective security services, advice and assistance;
 - Cooperation with other public authorities to facilitate their functions; and
 - Cooperation with other entities to respond to imminent threat.
8. All collection and analysis of intelligence undertaken by GCSB and NZSIS is in accordance with the New Zealand Government's priorities. These are primarily established through the National Security and Intelligence Priorities (NSIPs) which are set by the Government and reviewed every two years. The NSIPs outline the focus areas for all intelligence and assessment activity across the national security sector, including GCSB and NZSIS.
9. MPSs are an important part of the measures put in place by the Act to ensure these functions are carried out properly.

Matters covered by the MPSs

10. The MPSs cover areas of work of the agencies that involve gathering information about individuals and organisations that may intrude into the privacy of individuals and other areas where ministerial guidance was considered appropriate. There are currently 11 MPSs, covering the following activities:
 1. Providing information assurance and cybersecurity activities;
 2. Acquiring, using and maintaining an assumed identity;
 3. Creating and maintaining a legal entity (such as a cover company);
 4. Collecting information lawfully from persons without an intelligence warrant (human intelligence activities);
 5. Conducting surveillance in a public place;
 6. Obtaining and using publicly available information (open source information);
 7. Making requests for information from other agencies;
 8. Information management;
 9. Making false or misleading representations about being employed by an intelligence and security agency;
 10. Activities covered by the exemption from the Land Transport (Road User) Rule 2004; and
 11. Cooperation with overseas public authorities, including providing advice and assistance to and sharing intelligence with overseas public authorities.

[HYPERLINK TO EACH]

11. MPSs take effect from the date of signing and continue in effect for three years. The Minister responsible for GCSB and NZSIS may, amend, revoke or replace any of the MPSs at any time. However, they must consult with the Inspector-General of Intelligence and Security, any other relevant Minister, or any other person the Minister considers appropriate.
12. The Minister can issue further MPSs on other areas if considered necessary or desirable.

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Ministerial Policy Statement

Cooperating with overseas public authorities

[\[Link to landing page on purpose of MPSs\]](#)

Summary

It is important for New Zealand's security for GCSB and NZSIS to cooperate with overseas public authorities, including overseas intelligence agencies.

This Ministerial Policy Statement (MPS) provides guidance for GCSB and NZSIS in relation to cooperation with overseas public authorities. In making decisions related to foreign cooperation, employees must have regard to the following principles: respect for human rights, necessity, reasonableness and proportionality, protections for New Zealanders, information management and oversight. This MPS also specifies additional matters to be included in internal policy and procedures.

Definitions

Cooperation means to work together, and includes sharing intelligence and providing/receiving services, advice or assistance (including training, methodology and technology). This may be reciprocated or unreciprocated.

Overseas public authority means a foreign person or body that performs or exercises any public function, duty, or power conferred on that person or body by or under law.

Personal information means information about an identifiable individual

This MPS provides guidance on overseas cooperation

1. New Zealand has a robust legislative framework to govern the activities of GCSB and NZSIS, including activities that involve cooperation with overseas public authorities. The Act includes obligations for GCSB and NZSIS to act in accordance with New Zealand law and all human rights obligations recognised by New Zealand law,² independently and impartially, with integrity and professionalism and in a manner that facilitates effective oversight.

² Sections 10(3), 12(7), 17(a) and 18(b).

2. Cooperation with foreign partners can sometimes pose a risk of acting unlawfully with both domestic legal obligations and international obligations, including a risk that New Zealand could become complicit in some forms of unlawful conduct by another country.³ When undertaking overseas cooperation there are also a range of policy, human rights and reputational risks which need to be considered and managed. Consistent with New Zealand's respect for, and promotion of human rights, this MPS therefore provides policy guidance to, and sets expectations on, GCSB and NZSIS that extend beyond their legal obligations.

Scope of this MPS

3. This MPS applies to GCSB and NZSIS when cooperating with an overseas public authority (whether individually, jointly or with other government agencies). Cooperation may occur in relation to the performance of any of the functions of GCSB and NZSIS in sections 10 to 15 of the Act.
4. Cooperation must be lawful to be within scope of this MPS. Before and during foreign cooperation, GCSB and NZSIS must ensure their actions are consistent with their legal obligations. If in doubt, legal advice must be sought. Failure to act in accordance with New Zealand law could lead to possible criminal responsibility for employees of GCSB and NZSIS.

Context

Ministerial authorisation to cooperate

5. GCSB and NZSIS must obtain Ministerial authorisation where foreign cooperation involves the provision of intelligence, analysis or threat reporting.⁴ Ministerial authorisation can be sought on a case-by-case basis, for example to provide specific intelligence during a conference or event (such as APEC). Alternatively, Ministerial authorisation can be sought on a standing basis to provide intelligence to a range of overseas public authorities on an on-going basis.
6. Standing authorisations must be reviewed regularly to ensure that cooperation undertaken under the authorisation remains consistent with the principles in this MPS. In particular, if there are increased risks for ongoing cooperation either from changes to the domestic law, policy or practice of the overseas public authority subject to a standing authorisation, or from evidence they have carried out a significant breach of human rights, the standing authorisation must be reviewed by the responsible Minister on advice by GCSB and NZSIS.

² Complicity is a legal term which recognises that while a state did not carry out the wrongful act, if it knowingly aided or assisted another state to commit that wrongful act, it may be liable by law.

⁴By contrast, GCSB and NZSIS may provide protective security services to any public authority in New Zealand or overseas without requiring Ministerial authorisation (in accordance with section 11(1)(a) of the Act).

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7. GCSB and NZSIS must ensure sufficient information regarding the human rights practices of the overseas public authority is provided to the Minister to support decision-making. Guidance on this is contained within Appendix One.

New Zealand's intelligence and security relationships

8. New Zealand gains significant value from cooperating with overseas public authorities, particularly within the current climate of global and transnational threats. Close and reliable intelligence relationships help GCSB and NZSIS prioritise and focus their resources on the areas most important to New Zealand, while having access to a much greater pool of information, skills and technology that would not otherwise be available to New Zealand.
9. For example, an overseas partner may have specific linguistic or technical capabilities that GCSB and NZSIS need in order to obtain or assess intelligence relevant to New Zealand's security and intelligence priorities. Similarly, GCSB or NZSIS may provide intelligence to an overseas public authority to alert them to a potential threat to their security, which helps contribute to international security and New Zealand's overall international relations with that country.
10. In the context of protective security services, advice and assistance, GCSB or NZSIS may provide technology or expertise to an overseas public authority to develop, implement or improve upon their protective security arrangements. For example, providing expertise on conducting a security vetting assessment, information security systems or detecting and protecting against cybersecurity threats. Such cooperation helps overseas authorities store and protect New Zealand Government information and contributes to the recipient's national security and the security of their region.
11. The closest relationships GCSB and NZSIS have with overseas public authorities are those with equivalent agencies from Australia, Canada, the United Kingdom and the United States (often referred to as the "Five Eyes" partners). The relationships between Five Eyes partners are long-running, reciprocal, cover a wide range of topics, and involve a high degree of mutual trust, honesty and respect. The relationships provide New Zealand with knowledge and capability far beyond what we can afford on our own. These relationships work effectively due to the shared values and histories of the five countries and the strong relations between the governments of those countries. The depth of the Five Eyes relationship means that disparities in size, power and influence do not prevent any member from acting in the best interests of their own government, and members expect to be able to disagree on specific matters without damaging the broader relationship.
12. The GCSB and NZSIS may cooperate with overseas public authorities from countries beyond the Five Eyes. This cooperation may occur on an ongoing, relatively informal, or one-off basis. The reasons for cooperating with such authorities vary widely and may occur while performing any of the agencies' functions and as part of contributing to their objectives. Examples include – providing support to a major event such as APEC or the Olympic Games, or helping implement a Protective Security framework with an overseas public authority.

International and domestic obligations

13. New Zealand's core human rights obligations are detailed at Appendix Two. These include the right to life, the right not to be subjected to torture, the right not to be subjected to cruel, inhuman or degrading treatment or punishment, and the right to liberty and security of the person. New Zealand is also subject to other international obligations. These can be from a range of sources, including customary law obligations or binding United Nations resolutions. These obligations can range in nature from requiring action, prohibiting conduct or recognising rights.
14. The New Zealand Government has a long-standing and strong opposition to the use of torture, cruel, inhuman or degrading treatment or punishment in all cases and under all circumstances, including in response to threats to national security. The prohibition of torture is non-derogable –it can never be violated by states under any circumstances. New Zealand is opposed to the use of torture in all circumstances and will not commit torture nor be complicit in torture committed by others.
15. New Zealand is also a long-standing opponent of the death penalty. New Zealand has abolished the death penalty within its jurisdiction and is committed to promoting global prohibition.⁵ The position of the government is that the death penalty is the ultimate form of cruel, inhuman and degrading treatment. New Zealand will not cooperate on specific investigations where the cooperation will lead to a person being sentenced to death, unless there are appropriate assurances that the death penalty will not be carried out.⁶
16. The many positive benefits of New Zealand's participation in foreign intelligence and security relationships do not override New Zealand's legal obligations with respect to human rights.

Guidance for GCSB and NZSIS

17. This section sets out guidance for the agencies when undertaking foreign cooperation. All cooperation must be carried out in accordance with New Zealand law and the principles contained within this MPS. Cooperation with overseas public authorities should be regularly reviewed to ensure cooperation remains consistent with the principles below.

Principles

18. These principles constitute a basis for good decision-making and best practice conduct and need to be considered before, during and after cooperation with overseas public authorities.

Respect for human rights

19. GCSB and NZSIS must ensure that their cooperation with overseas public authorities is in accordance with all human rights obligations recognised by New Zealand law. The Directors-

⁵ Under the Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty.

⁶ See s27(2)(ca) Mutual Assistance in Criminal Matters Act and s30(3) of the Extradition Act 1999.

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General of GCSB and NZSIS must ensure the agencies remain informed of the human rights practices and potential risks related to cooperation with overseas public authorities.

20. There is an expectation that GCSB and NZSIS will undertake critical assessments of human rights risks and have a policy in place to ensure employees know how to assess risk and respond appropriately. To ensure the agencies' cooperation will not result in a real risk of contributing to, or being complicit in, a breach of human rights, this policy must address the risk assessment framework set out below, and provide guidance on when and how the framework is to be applied.

Risk assessment framework

- 1) *Assess general risk:* Assess the country or public authority's record and practice towards human rights and international humanitarian law. This assessment can include the country or public authority's stability, and where relevant, the success of any previous mitigation efforts that have been applied by New Zealand or close international partners when cooperating with the country or authority. See Appendix One for other factors the agencies should take into account.
- 2) *Risk arising from the proposed cooperation:* Consider whether the proposed cooperation, whether one-off or on-going, might result in a real risk of significantly contributing to or being complicit in a breach of human rights. The agencies must take a precautionary approach in making such assessments.
- 3) *Opportunity for mitigating risk:* Where it is identified that there is a real risk of a human rights breach occurring as a result of the proposed cooperation, GCSB and NZSIS should consider whether the risk can be mitigated, for example through conditions or restrictions on the cooperation provided, or through assurances or caveats on the intelligence exchanged.
- 4) *Response to a real risk of human rights breach:* If, following the steps above, there remains a real risk that the cooperation will significantly contribute to, or amount to complicity in, a breach of human rights, cooperation must be refused or referred to the Minister Responsible for the GCSB and NZSIS for decision. To inform the Minister's decision-making, the information identified in the steps above must be documented and provided to the Minister, along with a clear statement on the purpose of the proposed cooperation. In circumstances where a decision is put to the Minister, the agencies will notify the Inspector-General of Intelligence and Security.

Use of intelligence obtained through human rights breaches

21. GCSB and NZSIS must not request or use intelligence where they know, or assess there is a real risk the intelligence was obtained through a serious human rights breach – such as torture, or cruel, inhuman or degrading treatment.
22. There may be circumstances where GCSB or NZSIS know or assess there is a real risk that

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intelligence received, including unsolicited intelligence,⁷ was gained through a serious human rights breach. In such circumstances GCSB and NZSIS must not take action that would contribute to a further human rights breach, for example by requesting further intelligence about the same matter from the party responsible for that breach.

23. Where GCSB or NZSIS know or assess there is a real risk that intelligence received from an overseas partner was obtained through serious human rights breaches, the agencies may only use that intelligence in exceptional circumstances. Such circumstances are where the use of the intelligence is necessary to prevent loss of life, significant personal injury or a threat to critical national infrastructure. The reasons for limiting the use of intelligence in this way are:
 - a) It is consistent with New Zealand's opposition to torture and similar mistreatment.
 - b) There is a high likelihood that intelligence obtained through torture is unreliable.
24. GCSB and NZSIS do not have an enforcement function. Therefore, in such exceptional circumstances, the agencies must provide the intelligence to the relevant enforcement agency so that those agencies can take the action necessary to prevent the loss of life, significant personal injury or threat to critical national infrastructure. In these circumstances, the responsible Minister and the Inspector-General of Intelligence and Security must be informed as soon as practicable.
25. GCSB and NZSIS may still be required to undertake inquiries and investigate the intelligence that was passed to the relevant enforcement agency in order to inform the threat picture (for example, to identify the persons involved) or to provide advice to the Government on the particular security concern or risk.
26. When sharing such intelligence with law enforcement agencies, GCSB and NZSIS must mark the intelligence as having been potentially obtained as a result of torture and notify the recipient to ensure the intelligence is not used as evidence in legal proceedings.

Necessity

27. Cooperation with overseas public authorities must be for the purpose of contributing to the protection of New Zealand's national security, the international relations and well-being of New Zealand, or the economic well-being of New Zealand.
28. This may include cooperation to establish or maintain an international relationship. For example, establishing a new relationship in order to obtain intelligence relating to one (or more) of the Government's priorities may be considered necessary to enable the agencies to provide relevant intelligence and advice to the New Zealand government.

Reasonableness and proportionality

⁷ Unsolicited intelligence is intelligence received that was not specifically requested nor otherwise sought, but was received in the course of general intelligence sharing or cooperation with foreign partners.

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29. Cooperation with overseas public authorities, including any specific activities carried out as part of that cooperation, should be reasonable and proportionate to the purpose for carrying out that cooperation, the benefit gained from the cooperation, and the reputational risk to GCSB, NZSIS or the New Zealand Government.
30. Relevant factors in determining the reasonableness and proportionality of cooperation with an overseas public authority include:
 - a) the purpose and likely outcome of the cooperation;
 - b) the volume and detail of intelligence to be shared as part of the cooperation;
 - c) the nature of the cooperation;
 - d) the appropriate or necessary protections and/or restrictions in relation to the cooperation, including protections for New Zealanders; and
 - e) the status of New Zealand's bilateral relationship with that country, including any issues or areas of sensitivity that could have a bearing on the proposed cooperation.

Protections for New Zealanders

31. When cooperating with overseas public authorities, GCSB and NZSIS must continue to apply the same protections that would normally apply in New Zealand in relation to the specific activity. GCSB and NZSIS must not cooperate with an overseas public authority for the purposes of avoiding or circumventing those protections.
32. Where cooperation with an overseas public authority involves the sharing of intelligence or personal information relating to New Zealanders, GCSB and NZSIS will have particular regard to privacy interests when determining whether to disclose that personal information to, or when requesting such information from, overseas public authorities. This includes adherence to the [information privacy principles](#) contained in Part 3 of the Privacy Act 2020 as they apply to GCSB and NZSIS.

Information management

33. GCSB and NZSIS must be satisfied that the overseas public authority has adequate protections in place for the use and storage of information, including adequate protections against on-sharing with third parties without express consent from GCSB or NZSIS. These protections will be consistent with the principles in this MPS and the MPS on *Management of information obtained by GCSB and NZSIS*. In the event of a privacy breach, including the unauthorised on-sharing of information with third parties, the agencies will act in accordance with Part 6 of the Privacy Act 2020.

Oversight

34. GCSB and NZSIS must carry out all cooperation with overseas public authorities in a manner that facilitates effective accountability, transparency and oversight, including that of the Inspector-General of Intelligence and Security. This includes:

- appropriate record-keeping, in accordance with the Public Records Act 2005, which clearly outlines assessments and decision-making,
- maintaining up-to-date internal policies, procedures and guidance for staff, and
- reporting to the responsible Minister on the nature and outcomes of cooperation with overseas public authorities.

35. Reporting must include a specific section in GCSB and NZSIS annual reports on the agencies' intelligence and security relationships with overseas partners.

Matters to be reflected in internal policies and procedures

36. As public service agencies, GCSB and NZSIS must comply with policies and procedures common to all New Zealand public service agencies.⁸

37. In addition, GCSB and NZSIS must have, and act in compliance with, internal policies and procedures that are consistent with the requirements and principles of this MPS and have systems in place to support and monitor compliance.

38. These policies and procedures must also address the following matters:

- ***Human rights policy***

GCSB and NZSIS must have a policy setting out the factors in the Risk Assessment Framework. These factors must be considered when assessing whether a real risk of human rights breaches may exist in connection with cooperation with overseas public authorities, whether the cooperation is one off or ongoing. This policy must also include what specific information is required to be provided to the responsible Minister to inform decision-making when seeking authorisation (either on a case-by-case basis or in the form of a broader standing authorisation) to provide intelligence or analysis to an overseas public authority.

The policy must be forwarded in draft to the Inspector-General of Intelligence and Security for comment. The final version must be referred to the Intelligence and Security Committee (ISC) for noting.

This policy is important to ensure that employees act consistently with legal obligations and the Risk Assessment Framework in this MPS.

- ***Consultation with the Ministry of Foreign Affairs and Trade***

The Ministry of Foreign Affairs and Trade is to be consulted on arrangements with foreign jurisdictions or international organisations. Foreign policy objectives should be

⁸ This includes the Public Service Act 2020 and the Health and Safety at Work Act 2015.

considered in the development and framing of cooperation arrangements with foreign partners.

GCSB and NZSIS should have regard to any information available from the Ministry of Foreign Affairs and Trade on the status of the bilateral relationship with a country, a country's ratification of international human rights treaties and the human rights practices of a particular country.

- **Written basis for new formal arrangements**

In order to support greater transparency and enable a level of Parliamentary oversight, certain newly entered arrangements⁹ relating to cooperation with an overseas public authority, including any significant new arrangement entered into with an existing partner, or significant modification to an existing arrangement, must be referred to the ISC for noting in accordance with the considerations below. Such arrangements should be recorded in writing.

An arrangement that meets one of the following criteria must be referred to the ISC for noting:

- is likely to have significant implications for New Zealand's foreign policy or international relations;
- results in a significant change to the agencies' priorities or intelligence focus;
- involves significant expenditure of funds; and / or
- is seen to be inconsistent with Government objectives or priorities.

This includes arrangements that involve other government departments where GCSB and NZSIS are acting as the lead agency/agencies to the arrangement or the arrangement creates specific roles or obligations for the agencies. If there is any doubt whether the arrangement should be referred to the ISC, the arrangement must be referred to the Chair of the ISC for decision.

- **Training**

GCSB and NZSIS employees making decisions or taking any action relating to cooperation with an overseas public authority for the purpose of performing the agencies functions must be provided training on all relevant law, policies and procedures in relation to human rights obligations. This training should be provided to existing employees and new employees, and must be updated whenever there are changes or updates to the policies and procedures to ensure that at all times employees are aware of their obligations and how to apply them in practice.

⁹ An arrangement refers to an international instrument of less-than-treaty status (that is, it is not intended to be legally binding, but can still create important political commitments). For the purposes of this MPS, treaties where there has been a treaty examination waiver issued are also to be included within this definition.

Duration of ministerial policy statement

39. This MPS will take effect from XX for a period of three years. The Minister responsible for the GCSB and NZSIS may, at any time, amend, revoke or replace the MPS.

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Appendix One – Human Rights Information

1. A request to obtain Ministerial authorisation, whether a request for a one-off or standing authorisation, must include information regarding:
 - a) the purpose of the intelligence sharing, including how it contributes to GCSB's and NZSIS's statutory objectives and functions; and
 - b) any particular risks to human rights associated with the proposed cooperation and how likely it is that breaches could occur; and
 - c) where risk is identified, the factors that mitigate the likelihood of the human rights breach occurring. Such factors might include:
 - i.* the existence and effectiveness of mechanisms for monitoring or reviewing compliance with human rights obligations,
 - ii.* the reliability of any assurances provided by the foreign partner about how information will be used or how information to be provided was obtained, and
 - iii.* how likely the foreign partner is to comply with caveats associated with cooperation or use of information.
2. To assess the human rights practices of a country or public authority, in order to inform Ministerial authorisations and other actions by the agencies, GCSB and NZSIS should consider the following factors, as relevant:
 - a) the human rights record of the country or public authority, and any other country or public authority that may also be involved, including consideration of reports from credible international, governmental and non-governmental organisation sources;
 - b) whether the country has ratified relevant international human rights treaties, including any reservations that may have been made;
 - c) whether the country has mechanisms for independently investigating breaches of human rights;
 - d) whether the country has an independent judiciary with jurisdiction to hear cases relating to breaches of human rights;
 - e) whether the country has an established history of compliance with human rights obligations;
 - f) whether the country has an established history of investigating and prosecuting human rights breaches; and
 - g) whether the country has a legal framework and institutional arrangements that guide and appropriately constrain the activities of the country's intelligence and security sector.

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Appendix Two: New Zealand's Core Human Rights Obligations

Domestic law

To ensure that New Zealand meets its human rights obligations, GCSB and NZSIS employees must act consistently with domestic law under (but not limited to) the following statutes:

- New Zealand Bill of Rights Act 1990
- Human Rights Act 1993
- Privacy Act 2020
- Crimes Act 1961
- Crimes of Torture Act 1989
- Geneva Conventions Act 1958
- International Crimes and International Criminal Court Act 2000

International Obligations

New Zealand is a party to the following core international human rights instruments of the United Nations, and in doing so is bound by, and must regularly report on implementation and compliance with the obligations within those instruments. Actions or activities that run contrary to the obligations within these instruments may constitute a human rights breach in the context of this MPS.

- The International Covenant on Civil and Political Rights
- Second Optional Protocol to the International Covenant on Civil and Political Rights
- Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
- The International Covenant on Economic, Social and Cultural Rights
- The Convention on the Elimination of All Forms of Racial Discrimination
- Convention on the Rights of Persons with Disabilities
- Convention on the Elimination of all Forms of Discrimination against Women
- Convention Relating the Status of Refugees
- Convention on the Rights of the Child

New Zealand is also a party to other international criminal and international humanitarian instruments, of which the following may be relevant in the context of GCSB and NZSIS cooperating with overseas public authorities:

- Rome Statute of the International Criminal Court
- Geneva Conventions and their protocols

New Zealand may also have other relevant obligations under customary international law.

ATTACHMENT B

2017 VERSION OF MINISTERIAL POLICY STATEMENT: COOPERATING WITH OVERSEAS PUBLIC AUTHORITIES

Summary

It is important for New Zealand's security for the Government Communications Security Bureau (GCSB) and New Zealand Security Intelligence Service (NZSIS) to cooperate with overseas public authorities, including overseas intelligence agencies.

This ministerial policy statement (MPS) provides guidance for GCSB and NZSIS in relation to all forms of cooperation with overseas public authorities. In making decisions related to foreign cooperation, employees must have regard to the following principles: legality, human rights obligations, necessity, reasonableness and proportionality, protections for New Zealanders, information management and oversight. This MPS also specifies certain additional matters to be included in internal policy and procedures.

Definitions

The Act means the Intelligence and Security Act 2017.

Cooperation means any form of interaction, whether reciprocal or not, with an overseas public authority, including but not limited to training, advice, assistance, and sharing of information, intelligence, analysis, methods and technology.

GCSB means the Government Communications Security Bureau.

NZSIS means the New Zealand Security Intelligence Service.

Overseas public authority means a foreign person or body that performs or exercises any public function, duty, or power conferred on that person or body by or under law.

Personal information means information about an identifiable individual.

Purpose

1. This MPS is issued by the Minister Responsible for the GCSB and the Minister in Charge of the NZSIS pursuant to section 207(1) of the Act.
2. The purpose of the MPS is to provide guidance to GCSB and NZSIS on the conduct of activities that involve cooperation with overseas public authorities. The MPS comprises the Minister's expectations for how GCSB and NZSIS should properly perform their functions and establishes a framework for good decision-making and best practice conduct.
3. MPSs are also relevant to oversight of the agencies by the Inspector-General of Intelligence and Security in the exercise of her propriety jurisdiction (the Act requires the Inspector-General of Intelligence and Security to take account of any relevant MPS and the extent to which an agency has had regard to it when conducting any inquiry or review). A copy of this MPS will also be provided to the Intelligence and Security Committee of Parliament.
4. Every employee making decisions or taking any action related to cooperating with an overseas public authority must have regard to this MPS. Employees should be able to

explain how they had regard to the MPS. This might amount to an explanation of their consideration of any relevant internal policy or procedures that reflect the MPS. The Directors-General are responsible for ensuring the MPS is reflected in their agency's internal policies and procedures. If any action or decision is taken that is inconsistent with the MPS, employees must be able to explain why the action was taken and how they had regard to the MPS.

Scope

5. This MPS applies to cooperating with an overseas public authority, which includes providing advice and assistance to an overseas public authority and sharing intelligence with an overseas public authority. These activities may occur in relation to any of the functions of GCSB and NZSIS as specified or allowed for in sections 10 to 15 of the Act.
6. For the purposes of this MPS a broad interpretation of cooperation applies, in that specific activities may or may not be reciprocal, but will in some way involve GCSB or NZSIS interaction with an overseas public authority (also referred to as a foreign partner). To this end, it includes the provision of services, advice, assistance and intelligence which is not reciprocated, as well as reciprocally sharing intelligence, acting cooperatively on a project, or providing and receiving services, advice, and assistance. Cooperation may include an overall cooperative relationship between GCSB or NZSIS and an overseas public authority, interactions between employees of GCSB or NZSIS and the overseas public authority, or specific activities that occur as part of cooperation with a foreign partner.
7. GCSB and NZSIS may only request overseas public authorities to carry out activities that, if carried out by GCSB or NZSIS without an authorisation would be unlawful, in accordance with an authorisation issued under part 4 of the Act. In addition, the Directors-General of GCSB and NZSIS may request those authorities (or their personnel) to assist GCSB or NZSIS with giving effect to an authorisation (see section 51(1)). The carrying out of these types of authorised activities must be conducted consistently with the Act and the terms of the relevant authorisation, including any restrictions or conditions set out in the authorisation. This MPS does not apply to requests for assistance and activities which are carried out under an authorisation issued under part 4 of the Act.
8. The primary purpose of this MPS is to provide guidance on determining which overseas public authorities GCSB and NZSIS should engage with, and how that engagement should be regulated, including guidance on the types of activities that are appropriate to undertake with those parties. To the extent that it arises through cooperation with an overseas public authority, the MPS also addresses issues associated with the operational use of intelligence gained from a foreign partner.

Context

9. GCSB's and NZSIS's objectives are set out in the Act. Both agencies contribute to:
 - a) The protection of New Zealand's national security;
 - b) The international relations and well-being of New Zealand; and
 - c) The economic well-being of New Zealand.
10. GCSB and NZSIS do this through the performance of their statutory functions, which include:
 - a) Intelligence collection and analysis;
 - b) The provision of protective security services, advice and assistance;
 - c) Cooperation with other public authorities to facilitate their functions; and
 - d) Cooperation with other entities to respond to imminent threat.

11. MPSs are an important component of the measures put in place by the Act to ensure the functions of GCSB and NZSIS are performed with propriety and in accordance with New Zealand law and all human rights obligations recognised by New Zealand law.

New Zealand's intelligence and security relationships

12. The mandate provided by the agencies' objectives and functions is a New Zealand-centric one. Foreign cooperation is based on furthering New Zealand's interests and fulfilling any international obligations New Zealand has.
13. GCSB and NZSIS may cooperate with overseas public authorities in fulfilling any of GCSB's and NZSIS's functions. New Zealand gains significant value from international intelligence sharing and cooperation arrangements, particularly within the current climate of global and transnational threats. Through foreign intelligence partnerships and other cooperation, GCSB and NZSIS are able to draw on a much greater pool of information, skills and technology than would otherwise be available to them. Close and reliable relationships with overseas public authorities help GCSB and NZSIS to prioritise and focus their limited resources on the areas most important to New Zealand, while having access to resources that would not normally be available.
14. For example, a foreign partner may have access to information that requires specific linguistic, ethnic or cultural backgrounds to collect and analyse which New Zealand does not possess. As part of their intelligence collection and analysis function, GCSB and NZSIS may seek to obtain that intelligence. Similarly, GCSB or NZSIS might provide intelligence to an overseas public authority so that authority can take action to address a threat to New Zealand's national security (such as a threat to New Zealanders overseas), or to contribute to New Zealand's international relations with the partner country.
15. In the context of protective security services, advice and assistance, GCSB or NZSIS might provide technology or expertise to an overseas public authority (which might include seconding staff) to support that authority with its own protective security requirements, such as systems for vetting security cleared personnel, or detecting cybersecurity threats. This advice and assistance could contribute to New Zealand's national security by mitigating common threats and developing international relations with the partner countries, and contribute to New Zealand's economic well-being by reducing risks to New Zealand companies operating overseas.
16. The closest relationships that GCSB and NZSIS have with overseas public authorities are those with equivalent agencies from Australia, Canada, the United Kingdom and the United States (often referred to as the "Five Eyes" partners). The relationships between Five Eyes partners are long-running, reciprocal, cover a wide range of topics, and involve a high degree of mutual trust, honesty and respect. The relationships provide New Zealand with knowledge and capability far beyond what we can afford on our own.
17. These relationships work effectively due to the shared values and histories of the five countries and the strong relations between the governments of those countries in general. The depth of the Five Eyes relationship means that disparities in size, power and influence do not prevent any member from acting in the best interests of their own government, and members expect to be able to disagree on specific matters without damaging the broader relationship.
18. GCSB and NZSIS may also cooperate with overseas public authorities from other countries. This cooperation may occur on a routine or relatively ad hoc basis. The reasons for cooperating with such authorities may vary widely and may occur in the course of performing any of the agencies' functions and as part of contributing to any of their objectives. It is essential to New Zealand's ability to protect its national security,

international relations and economic well-being to share information and intelligence with agencies outside traditional partnerships.

International obligations

19. New Zealand may be subject to international obligations to cooperate with overseas partners, in order to promote the exchange of information to help improve international responses to threats to global peace and security. For example, United Nations Security Council Resolution 1373 (2001) calls on states to “find ways of intensifying and accelerating the exchange of operational information, especially regarding actions and movements of terrorist persons or networks”. Under this resolution, Member States are required to have in place procedures and mechanisms that encourage exchange of information in accordance with international and domestic law, which includes international human rights obligations.
20. The many positive benefits of New Zealand’s participation in foreign intelligence and security relationships do not override the rights of New Zealanders and the international human rights obligations New Zealand has adopted through their incorporation into domestic law. New Zealand is also subject to other international obligations, including through customary international law and as a member of the United Nations. For example, New Zealand is bound by United National Security Council Resolution 1456 (2003), which requires Member states to “ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee and humanitarian law”.
21. New Zealand’s core international human rights obligations, including those at customary international law, are detailed at Appendix One. They include the right to life, the right not to be subjected to torture, the right not to be subjected to cruel, inhuman or degrading treatment or punishment, and the right to liberty and security of the person.
22. The New Zealand Government has a long-standing and strong opposition to the use of torture, cruel, inhuman or degrading treatment or punishment (including the death penalty) in all cases and under all circumstances, including in response to threats to national security. New Zealand is committed to actively preventing torture, cruel, inhuman or degrading treatment or punishment, and will not, by act or omission, encourage, aid, or abet such action.

Duty to act with due diligence

23. Section 17(a) of the Act imposes a general duty on GCSB and NZSIS to act in accordance with New Zealand law and all human rights obligations recognised by New Zealand law. Sections 10(3) and 12(7) also explicitly impose an obligation on the responsible Minister to be satisfied the agencies will be acting consistently with such law when authorising the sharing of intelligence, analysis and threat reporting with foreign partners. Compliance with this obligation necessitates a practice of due diligence by the Directors-General of GCSB and NZSIS in relation to cooperation with overseas public authorities. The guidance in this MPS provides a framework for exercising that due diligence when determining whether it will be appropriate to engage with a particular overseas public authority, and when determining that the proposed activities are consistent with the law – particularly with respect to ensuring that GCSB and NZSIS do not become complicit in human rights abuses.
24. The Directors-General have a duty to take steps as are reasonable in the circumstances of each particular situation to identify risks of human rights being breached by partner countries and international actors. To ensure that agencies are not associated (either

directly or indirectly) with activities that may be unlawful or improper, as a result of cooperation with an overseas public authority, it is expected that GCSB and NZSIS will establish an awareness of and regularly monitor the human rights practices of any overseas public authorities with which the agencies cooperate. The agencies are also expected to further enquire when there is an indication that human rights breaches might occur in a situation, and decline or stop cooperating with the overseas public authority where a real or substantial risk of breach of human rights obligations (such as the prohibition of torture) is identified.

25. Failure to act in accordance with the provisions of the Act and this MPS could lead to possible criminal responsibility for employees of GCSB and NZSIS. For example, Section 3 of the Crimes of Torture Act 1989, which applies to activities conducted within or outside New Zealand, makes it a crime for a public official or anyone acting in an official capacity to attempt or to commit an act of torture, to act or omit to act in a way that aids any person to commit an act of torture, to abet any person in the commission of an act of torture, or to incite, counsel, procure or conspire with any person to commit an act of torture, and to be an accessory after the fact to an act of torture.

Unsolicited intelligence

26. The absolute prohibition in international law (and which is incorporated in New Zealand law) on the use of information gained through torture for evidentiary purposes arises from the need to remove any incentives to torture and recognises that such information is inherently unreliable. This obligation is non-derogable – it cannot be violated by states under any circumstances.

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27. There may be exceptional circumstances where unsolicited intelligence is received by GCSB or NZSIS that indicates a credible national security threat to New Zealand or risk to New Zealanders that has been, or is suspected to have been, obtained through human rights abuses committed by another party.
28. GCSB and NZSIS do not have an enforcement function in relation to measures to protect national security. If intelligence is received that indicates a credible risk to the safety of New Zealanders that requires action to be taken to protect lives and property, GCSB and NZSIS must provide that information to the relevant enforcement agency. The information will not be used for evidentiary purposes in legal proceedings.

Principles

29. The following principles constitute a framework for good decision-making and must be taken into account by GCSB and NZSIS when cooperating with overseas public authorities in the performance of one or more of the agencies' functions. All forms of cooperation with overseas public authorities, at all levels, should be subject to ongoing review as to whether it continues to be consistent with these principles.

Legality

30. GCSB and NZSIS must ensure that cooperation with overseas public authorities is conducted in accordance with New Zealand law and all human rights obligations recognised by New Zealand law. GCSB and NZSIS should also have regard to New Zealand's human rights obligations at international law, including customary international law (see Appendix One).
31. For all forms of cooperation with overseas public authorities, GCSB and NZSIS must have internal policies in place that ensure the agencies act in accordance with New Zealand law and all human rights obligations recognised by New Zealand law; and must have procedures in place to ensure those policies have been adhered to. Where appropriate, legal advice should be sought.
32. Where Ministerial approval for cooperation is required, GCSB and NZSIS have a positive obligation to provide sufficient information regarding the legality of cooperation with overseas public authorities to the Minister, in order for the Minister to determine whether the requirements under sections 10(3) and 12(7) of the Act are met.
33. Where there may be uncertainty or cause for concern as to whether cooperation with an overseas public authority is lawful, specific information detailing the nature of the cooperation and the factors that gave rise to that uncertainty or concern (such as examples of previous actions by the foreign partner, external reports, or advice from the Ministry of Foreign Affairs and Trade) should be provided to the responsible Minister (in the case of Ministerial approvals) to assist decision-making, or to the Director-General (in the case of internal approvals).
34. Where necessary, the Ministry of Justice should be consulted on New Zealand's human rights law and information sought from the Ministry of Foreign Affairs and Trade regarding New Zealand's international human rights obligations and the adherence of other countries to these obligations.

Human rights obligations

35. GCSB and NZSIS must not undertake any activity in cooperation with an overseas public authority, including receiving or sharing any intelligence, where GCSB or NZSIS knows or assesses that there is a real risk that the activity will lead to or has been obtained as a result of human rights breaches in any country, against any person(s). In these

circumstances, the continued receipt or sharing of intelligence should cease, subject to a reassessment in accordance with legal obligations, the principles in this MPS and relevant policies.

36. This provides a duty to apply due diligence: GCSB and NZSIS are to assess the likelihood of human rights breaches occurring (or having occurred) in connection with any sharing of intelligence or cooperation by the agencies with an overseas public authority, including in any subsequent actions taken by that public authority as a result of the cooperation or sharing of intelligence.
37. To avoid any complicity in human rights breaches by an overseas public authority, when assessing this likelihood, GCSB and NZSIS must take into account factors such as:
 - the human rights record of the country or public authority, and any other country or public authority that may also be involved, including consideration of reports from credible international, governmental and non-governmental organisation sources;
 - whether the country has ratified relevant international human rights treaties, including any reservations that may have been made;
 - whether the country has mechanisms for independently investigating breaches of human rights;
 - whether the country has an independent judiciary with jurisdiction to hear cases relating to breaches of human rights;
 - whether the country has an established history of compliance with human rights obligations;
 - whether the country has an established history of investigating and prosecuting human rights breaches; and
 - whether the country has a legal framework and institutional arrangements that guide and appropriately constrain the activities of the country's intelligence and security sector.
38. When authorising the provision of intelligence and analysis, or the provision of threat reports produced from the provision of information assurance and cybersecurity activities, to an overseas public authority, the responsible Minister must be satisfied that GCSB and NZSIS will be acting in accordance with New Zealand domestic law, including all human rights obligations recognised by New Zealand law.
39. The Minister must be satisfied of this on the basis of information provided to him or her by GCSB or NZSIS about the particular proposal to share intelligence, analysis or threat reporting. The Minister's authorisation may be made on a case-by-case basis or may take the form of a broader standing authorisation, for example to share specific categories of intelligence, analysis or threat reporting with certain overseas public authorities, or to share the full range of intelligence, analysis or threat reporting within an established intelligence and security relationship with a foreign country, groups of countries or overseas public authority.
40. A request to share intelligence, analysis and threat reporting with a foreign partner, whether on a case-by-case basis, or within the context of a broader standing authorisation, must include information about the specific proposal and must include an assessment of the human rights practices of the foreign partner, or describe the process by which the agencies will make that assessment. The assessment must be based on:
 - the human rights record of the country (as reflected in the considerations at paragraph 37 above)

- any particular risks to human rights associated with the proposed cooperation and how likely it is that breaches could occur; and
 - factors that mitigate the likelihood of human rights breaches occurring. Such factors might include the existence and effectiveness of mechanisms for monitoring or reviewing compliance with human rights obligations, the reliability of any assurances provided by the foreign partner about how information will be used or how information to be provided was obtained, and how likely the foreign partner is to comply with caveats associated with cooperation or use of information.
41. The decision to authorise the sharing of intelligence, analysis or threat reporting with a foreign partner, whether made by the Minister on a case-by-case basis or by the agencies within a broader standing authorisation, must also consider:
- all applicable legal obligations under New Zealand and international law, and any relevant international commitments New Zealand may have; and
 - the purpose of the intelligence sharing, including how it contributes to GCSB's and NZSIS's statutory objectives to contribute to the protection of New Zealand's national security, the international relations and well-being of New Zealand, and the economic well-being of New Zealand.
42. The responsible Minister may issue standing authorisations for GCSB or NZSIS to share specific classes of intelligence, analysis and threat reporting with certain overseas public authorities, or to share intelligence, analysis and threat reporting with a specific overseas public authority or with a particular country or group of countries. When issuing a standing authorisation, the Minister must be satisfied on the basis of an assessment which considers the same factors in paragraphs 40 and 41 above. Standing authorisations may specify conditions, limits or exclusions that apply in respect of the sharing of intelligence, analysis and threat reporting under the authorisation. The Minister will specify thresholds of risk at which decisions made under a standing authorisation must be referred back to the responsible Minister.
43. The existence of a standing authorisation does not excuse GCSB and NZSIS of the obligation to undertake ongoing monitoring to ensure that cooperation undertaken under the authorisation remains consistent with the framework in this MPS. In particular, the agencies must conduct a risk assessment of human rights breaches occurring if there is any reason to believe a specific instance of cooperation might lead to such an infringement. Further, if there is evidence that a human rights breach has occurred, or there are changes to domestic policy or practice in any country subject to a standing authorisation that may increase the likelihood of violations of human rights, the standing authorisation must be reviewed by the responsible Minister.
44. Where Ministerial authorisation for cooperation is not required, GCSB and NZSIS must have processes that require internal authorisation to cooperate with an overseas public authority to be granted by appropriately senior staff, according to an assessment of the risk of human rights breaches connected with that cooperation. Where there is a reasonable basis for concern about a country's human rights record or that the cooperation in question might involve complicity in breaches of human rights, GCSB and NZSIS must seek authorisation from the responsible Minister before undertaking any cooperation. GCSB and NZSIS must provide the Minister with an assessment that addresses the factors outlined at paragraphs 40 and 41.
45. If GCSB or NZSIS become aware that their cooperation with an overseas public authority means GCSB or NZSIS may have been complicit in human rights breaches the agency must immediately suspend cooperation with that authority (and any others related to it) and

notify the responsible Minister and the Inspector-General of Intelligence and Security, and if necessary, the Solicitor-General. An internal review to determine whether agency policies and procedures were correctly applied in respect of the cooperation must also be conducted by the relevant agency.

46. In the event GCSB or NZSIS receives unsolicited information indicating a credible national security risk to New Zealand or risk to the safety of New Zealanders, but that has been, or is suspected to have been, obtained through human rights abuses committed by another party the Directors-General will consider the need to ensure public safety and the protection of life and property in determining whether to pass that information to the relevant enforcement agency. In considering whether to pass on the information for operational purposes, GCSB and NZSIS must be mindful that the reliability of such information may be limited. Where information of this nature is passed on, the responsible Minister and the Inspector-General of Intelligence and Security must be informed as soon as practicable.

Necessity

47. Cooperation by GCSB or NZSIS with any foreign partner must be for the purpose of protecting New Zealand's national security, the international relations and well-being of New Zealand, and the economic well-being of New Zealand. Specific cooperation with overseas public authorities should only occur for purposes necessary to support the agencies to perform their statutory functions. This may include building the capacity of GCSB or NZSIS to perform a particular statutory function, or for establishing or maintaining an international relationship that will support GCSB or NZSIS to perform their statutory functions.

Reasonableness and proportionality

48. The impact of cooperation with overseas public authorities (including any specific activities carried out as part of that cooperation) should be reasonable and proportionate to the purpose for carrying out that cooperation, the benefit gained from the cooperation, and the reputational risk to GCSB, NZSIS or the New Zealand Government.
49. Relevant factors in determining the reasonableness and proportionality of cooperation with an overseas public authority include:
- having a clear understanding of the nature and purpose of the specific activities and any subsequent actions that are likely to result;
 - having a clear understanding of the nature and purpose of the intelligence and security relationship with the particular overseas public authority;
 - being aware of the status of the bilateral relationship with the country as a whole (especially any issues or areas of sensitivity between New Zealand and the partner country that could have a bearing on the proposed activities);
 - any limitations or restrictions on activity that either party has; and
 - any protections that may be in place in relation to the activity or to intelligence provided or received.
50. For example, when New Zealand is seeking assistance or intelligence or information from partners, GCSB or NZSIS should be clear as to why they seek the assistance or intelligence or information from the partner country, and about the expectations of the New Zealand Government that no human rights breaches occur in the provision of that assistance or in the collection or provision of the intelligence or information.

51. Where New Zealand is asked to provide assistance, intelligence or information by overseas partners, GCSB or NZSIS should be as informed as is possible about the particular situation. This should include being aware of the purpose and value of the proposed activity and that there is sufficient evidence, not based on human rights breaches, of the need for the activity.
52. For example, when sharing intelligence, this would include consideration of whether this was reciprocal sharing of intelligence on a routine and systematic basis, as part of a wider intelligence relationship; regular sharing of intelligence but on a case-by-case basis; responding to one-off ad hoc (and potentially urgent) requests for intelligence; or pro-active ad hoc sharing by the agencies to mitigate a risk to a third country.

Protections for New Zealanders

53. When cooperating with overseas public authorities, GCSB and NZSIS must continue to apply the same protections for New Zealand citizens and permanent residents that would normally apply in New Zealand in relation to the specific activity. GCSB and NZSIS must not cooperate with an overseas public authority for the purposes of avoiding or circumventing those protections.
54. Where cooperation with an overseas public authority involves the sharing of intelligence or personal information relating to New Zealanders, GCSB and NZSIS must have particular regard to the privacy interests of the New Zealanders when determining whether to disclose that personal information to overseas partners, or when requesting such information from overseas partners. This includes adherence to the [information privacy principles](#) contained in Part 2 of the Privacy Act 1993 as they apply to GCSB and NZSIS. GCSB and NZSIS must be satisfied that the overseas public authority has adequate protections in place for the use and storage of New Zealanders' information, including adequate protections against further sharing with third parties without express consent from GCSB or NZSIS.

Information management

55. GCSB and NZSIS will take steps to ensure that information obtained by GCSB and NZSIS and subsequently shared with overseas public authorities is managed in accordance with all information management requirements, standards and guidelines that relate to that information (such as the New Zealand Protective Security Requirements, New Zealand Government Security Classification System, and New Zealand Information Security Manual), and any other obligations as addressed in the MPS on *Management of information obtained by GCSB and NZSIS*.
56. GCSB and NZSIS are to specify the protection, storage and use (including restrictions on the passing on of that information to any third parties) requirements that are to be adhered to in respect of any information, including personal information about New Zealanders, shared with an overseas public authority. Those requirements will be consistent with the principles in this MPS and the MPS on *Management of information obtained by GCSB and NZSIS*. It is recognised that the overseas public authority may be required to adhere its own national requirements when managing received information and this may conflict with conditions imposed by GCSB or NZSIS. GCSB and NZSIS should seek to be consulted regarding any national requirements of an overseas partner that may lead to shared information being used in a manner that conflicts with restrictions that would apply in New Zealand.

Oversight

57. GCSB and NZSIS must carry out all cooperation with overseas public authorities in a manner that facilitates effective accountability, transparency and oversight. This includes the use of clear authorisation procedures, the keeping of appropriate records, maintaining up-to-date internal policies and procedures and guidance for staff, and reporting to the responsible Minister on the nature and outcomes of cooperation with overseas public authorities. Reporting must include a specific section in GCSB and NZSIS annual reports on the agencies' intelligence and security relationships with overseas partners.

Matters to be reflected in internal policies and procedures

58. GCSB and NZSIS must have, and act in compliance with, internal policies and procedures that are consistent with the requirements and principles above, and must have systems in place to support and monitor compliance. Those policies and procedures must also address the following additional matters:

Human rights policy

GCSB and NZSIS must have a policy setting out the factors that must be considered when assessing whether a real risk of human rights breaches may exist in connection with cooperation with overseas public authorities. This policy must also include what specific information is required to be provided to the responsible Minister before authorisation (either on a case-by-case basis or in the form of a broader standing authorisation) is given to share intelligence or analysis to an overseas public authority.

This policy is important to ensure that employees do not inadvertently place themselves or the New Zealand Government at legal risk by their action or inaction.

Consultation with the Ministry of Foreign Affairs and Trade

Foreign policy objectives should be considered in the development and framing of cooperation arrangements with foreign partners. The Ministry of Foreign Affairs and Trade is to be consulted on any proposal to enter into an arrangement with a foreign jurisdiction or international organisation.

GCSB and NZSIS should also seek information from, and have regard to any information provided by, the Ministry of Foreign Affairs and Trade on the status of the bilateral relationship with a country, and when weighing up factors related to a country's ratification of international human rights treaties and the human rights record of a particular country.

Written basis for new formal arrangements

All new bilateral or multilateral arrangements relating to cooperation and intelligence sharing with a foreign jurisdiction or overseas public authority must be referred to the Intelligence and Security Committee of Parliament for noting. Such arrangements should be recorded in writing.

GCSB and NZSIS must formulate standard terms for ad hoc cooperation and intelligence sharing, which are to be recorded in an internal policy. These terms are to establish consistent principles, standards and practices that will be applied to ad hoc cooperation and intelligence sharing activities to ensure that GCSB and NZSIS complies with New Zealand law and all human rights obligations recognised by New Zealand law. Those terms should be consistent with this MPS. These terms must be forwarded in draft to the Inspector-General of Intelligence and Security for comment and the final version referred to the Intelligence and Security Committee of Parliament for noting.

Training

All employees of GCSB and NZSIS must be provided training on all relevant law, policies and procedures in relation to the agencies' human rights obligations. This training should be provided for all existing employees and for new employees at induction, and whenever there are changes or updates to the policies and procedures, to ensure that at all times employees are aware of their obligations.

Compliance with State Services Code of Conduct

The Directors-General of GCSB and NZSIS must issue policies and procedures that reflect their agencies' obligations under the State Sector Act 1988.

Health and safety

All cooperation with overseas public authorities must be undertaken consistently with GCSB's and NZSIS's obligations under the Health and Safety at Work Act 2015.

Authorisation procedures

59. Within the context of this MPS, the responsible Minister must authorise the following:

- The provision of any intelligence collected and any analysis of that intelligence to an overseas public authority
- The provision of threat reports produced as a result of information assurance and cybersecurity activities to an overseas public authority

60. In determining whether to authorise the sharing of intelligence, analysis and threat reporting to an overseas public authority, the Minister must be satisfied that GCSB and NZSIS will be acting in accordance with New Zealand law including all human rights obligations recognised by New Zealand law.

61. The Minister will authorise the sharing of intelligence, analysis or threat reporting with a foreign partner on the basis of information provided to him or her by GCSB and NZSIS. This authorisation may be on a case-by-case basis or in the form of a broader standing authorisation. All requests for authorisation to share intelligence, analysis and threat reporting must include an assessment that addresses all factors listed in paragraphs 40 and 41 of this MPS, or describe how the agencies will make that assessment.

62. GCSB and NZSIS may seek a standing authorisation from the Minister that covers the sharing of specific classes of intelligence, analysis and threat reporting with certain overseas public authorities, or to share intelligence, analysis and threat reporting with a specific overseas public authority or with a particular country or group of countries. A request for a standing authorisation must include an assessment which considers the factors outlined in paragraphs 40 and 41 of this MPS, or describe how the agencies will make that assessment.

63. The Minister may specify conditions, limits or exclusions that are to apply in respect of the sharing of intelligence, analysis and threat reporting with an overseas public authority or country under a standing authorisation. The Minister will specify thresholds of risk at which decisions made under a standing authorisation must be referred back to the Minister. Standing authorisations must be reviewed when this MPS is amended, revoked or replaced, and if a human rights breach occurs or there are changes to domestic policy or practice in the country that may increase the likelihood of violations of human rights.

64. Where Ministerial authorisation for cooperation is not required, there must be clear levels of decision-making for each type of activity that may involve foreign cooperation, which must be documented. GCSB and NZSIS must have in place approval levels that are proportionate to the operational, reputational, legal and health and safety risks in cooperation with overseas public authorities: the greater the risk, the more senior the level of approval required. An assessment of the risk of human rights breaches connected with the foreign cooperation must be carried out, that includes the considerations outlined at paragraphs 40 and 41 of this MPS. Approval levels will include seeking authorisation from the Minister at agreed levels of risk, in particular where there is a reasonable basis for concern about a country's human rights record or that the cooperation in question might involve complicity in breaches of human rights.

65. The Directors-General of GCSB and NZSIS may authorise the passing of unsolicited intelligence indicating a credible national security risk to New Zealand or risk to the safety of New Zealanders that has been, or is suspected to have been, obtained through human right abuses committed by another party, to an enforcement agency. The Directors-General must consider the need to ensure public safety and the protection of life and property, and must be mindful that the reliability of such information is likely to be limited. If such information is passed on to an enforcement agency the responsible Minister and Inspector-General of Intelligence and Security must be informed as soon as practicable.

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Duration of ministerial policy statement

66. This MPS will take effect from 28 September 2017 for a period of three years. The Minister who issued an MPS may, at any time, amend, revoke or replace the MPS.
67. At the time of issue of this MPS, the Inspector-General of Intelligence and Security is undertaking an Inquiry into possible New Zealand engagement with Central Intelligence Agency (CIA) detention and interrogation, 2001-2009, and current intelligence cooperation safeguards. When completed, the conclusions from that inquiry may give cause for the issuing Minister to review and reissue this MPS.

Ministerial Policy Statement issued by:



Hon Christopher Finlayson
Minister responsible for the Government Communications Security Service
Minister in charge of the New Zealand Security Intelligence Service

September 2017

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Appendix One:

New Zealand's Core Human Rights Obligations

Domestic law

To ensure that New Zealand meets its human rights obligations, GCSB and NZSIS employees must act consistently with domestic law under (but not limited to) the following statutes:

- New Zealand Bill of Rights Act 1990
- Human Rights Act 1993
- Privacy Act 1993
- Crimes Act 1961
- Crimes of Torture Act 1989
- Geneva Conventions Act 1958
- International Crimes and International Criminal Court Act 2000

International Obligations

New Zealand is a party to the following core international human rights instruments of the United Nations, and in doing so is bound by, and must regularly report on, the obligations within those instruments. Actions or activities that run contrary to the obligations within these instruments may constitute a human rights breach in the context of this MPS.

- The International Covenant on Civil and Political Rights
- Second Optional Protocol to the International Covenant on Civil and Political Rights
- Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
- The International Covenant on Economic, Social and Cultural Rights
- The Convention on the Elimination of All forms of Racial Discrimination
- Convention on the Rights of Persons with Disabilities
- Convention on the Elimination of all forms of Discrimination against Women
- Convention Relating the Status of Refugees
- Convention on the Rights of the Child

New Zealand is also a party to other international criminal and international humanitarian instruments, of which the following may be relevant in the context of GCSB and NZSIS cooperating with overseas public authorities:

- Rome Statute of the International Criminal Court
- Geneva Conventions and their protocols

New Zealand may also have other relevant obligations under customary international law.

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ATTACHMENT C

Letter to Hon Nanaia Mahuta, Minister of Foreign Affairs

Hon Nanaia Mahuta
Minister of Foreign Affairs
Parliament Buildings

Dear Minister Mahuta

Consultation on Ministerial Policy Statement – Cooperating with Overseas Public Authorities

I enclose for your comment a draft of the revised Ministerial Policy Statement (MPS) regarding GCSB and NZSIS cooperation with overseas public authorities.

Sections 206 and 207 of the Intelligence and Security Act (the Act) requires the Minister(s) responsible for the intelligence and security agencies to issue MPSs about certain lawful activities carried out by the agencies. The MPSs are required to be reviewed within three years from the date they take effect.

MPSs are a mechanism for the responsible Minister(s) to set expectations and provide guidance about the conduct of those activities. MPSs do not affect the lawfulness of the activities, but may be taken into account by the Inspector-General of Intelligence and Security when they are assessing the propriety of the agencies' activities. As the current Minister responsible for both the GCSB and the NZSIS, I must review and reissue the MPSs.

Under section 212 of the Act I am required to consult with any Ministers of the Crown whose area of responsibility includes an interest in the proposed statement. In this case, I seek your comments as the MPS is relevant to your portfolio responsibilities as Minister of Foreign Affairs.

If you have any comments, I would be grateful to receive these by **[date]**.

Given your portfolio responsibilities in supporting New Zealand's international agreements, commitments and obligations, and your role in overseeing the development of the detention policy as part of the government response to Operation Burnham, I would welcome any insights that you may have on overseas cooperation. Officials from the Department of the Prime Minister and Cabinet have liaised with officials from the Ministry of Foreign Affairs and Trade and their feedback has been incorporated in the attached draft.

Yours sincerely

Hon Andrew Little
Minister Responsible for the GCSB
Minister Responsible for the NZSIS

ATTACHMENT D

Letter to Hon Poto Williams, Minister of Police

Hon Poto Williams
Minister of Police
Parliament Buildings

Dear Minister Williams

Consultation on Ministerial Policy Statement – Cooperating with Overseas Public Authorities

I enclose for your comment a draft of the revised Ministerial Policy Statement (MPS) regarding GCSB and NZSIS cooperation with overseas public authorities.

Sections 206 and 207 of the Intelligence and Security Act (the Act) requires the Minister(s) responsible for the intelligence and security agencies to issue MPSs about certain lawful activities carried out by the agencies. The MPSs are required to be reviewed within three years from the date they take effect.

MPSs are a mechanism for the responsible Minister(s) to set expectations and provide guidance about the conduct of those activities. MPSs do not affect the lawfulness of the activities, but may be taken into account by the Inspector-General of Intelligence and Security when they are assessing the propriety of the agencies' activities. As the current Minister responsible for both the GCSB and the NZSIS, I must review and reissue the MPSs.

Under section 212 of the Act I am required to consult with any Ministers of the Crown whose area of responsibility includes an interest in the proposed statement. In this case, I seek your comments as the MPS is relevant to your portfolio responsibilities as Minister of Police.

If you have any comments, I would be grateful to receive these by **[date]**.

Given Police also undertake similar cooperation with overseas authorities, I would welcome insights that you may have on the guidance in this MPS or ways that we might better align our respective portfolios' policies on foreign cooperation. Officials from the Department of the Prime Minister and Cabinet have liaised with officials from the New Zealand Police and their feedback has been incorporated in the attached draft.

Yours sincerely

Hon Andrew Little
Minister Responsible for the GCSB
Minister Responsible for the NZSIS

ATTACHMENT E

Letter to Hon Kris Faafoi, Minister of Justice, Minister of Immigration

Hon Kris Faafoi
Minister of Justice and Minister of Immigration
Parliament Buildings

Dear Minister Faafoi

Consultation on Ministerial Policy Statement – Cooperating with Overseas Public Authorities

I enclose for your comment a draft of the revised Ministerial Policy Statement (MPS) regarding GCSB and NZSIS cooperation with overseas public authorities.

Sections 206 and 207 of the Intelligence and Security Act (the Act) requires the Minister(s) responsible for the intelligence and security agencies to issue MPSs about certain lawful activities carried out by the agencies. The MPSs are required to be reviewed within three years from the date they take effect.

MPSs are a mechanism for the responsible Minister(s) to set expectations and provide guidance about the conduct of those activities. MPSs do not affect the lawfulness of the activities, but may be taken into account by the Inspector-General of Intelligence and Security when they are assessing the propriety of the agencies' activities. As the current Minister responsible for both the GCSB and the NZSIS, I must review and reissue the MPSs.

Under section 212 of the Act I am required to consult with any Ministers of the Crown whose area of responsibility includes an interest in the proposed statement. In this case, I seek your comments as the MPS is relevant to your portfolio responsibilities as Minister of Justice.

If you have any comments, I would be grateful to receive these by **[date]**.

Noting your portfolio responsibilities in supporting New Zealand's human rights commitments and obligations, I would welcome insights that you may have on overseas cooperation or the guidance in this MPS. Officials from the Department of the Prime Minister and Cabinet have liaised with officials from the Ministry of Justice and their feedback has been incorporated in the attached draft. You may also have comments from your Immigration portfolio, given the intelligence functions of Immigration New Zealand.

Yours sincerely

Hon Andrew Little
Minister Responsible for the GCSB
Minister Responsible for the NZSIS

ATTACHMENT F

Letter to Hon Peeni Henare, Minister of Defence

Hon Peeni Henare
Minister of Defence
Parliament Buildings

Dear Minister Henare

Consultation on Ministerial Policy Statement – Cooperating with Overseas Public Authorities

I enclose for your comment a draft of the revised Ministerial Policy Statement (MPS) regarding GCSB and NZSIS cooperation with overseas public authorities.

Sections 206 and 207 of the Intelligence and Security Act (the Act) requires the Minister(s) responsible for the intelligence and security agencies to issue MPSs about certain lawful activities carried out by the agencies. The MPSs are required to be reviewed within three years from the date they take effect.

MPSs are a mechanism for the responsible Minister(s) to set expectations and provide guidance about the conduct of those activities. MPSs do not affect the lawfulness of the activities, but may be taken into account by the Inspector-General of Intelligence and Security when they are assessing the propriety of the agencies' activities. As the current Minister responsible for both the GCSB and the NZSIS, I must review and reissue the MPSs.

Under section 212 of the Act I am required to consult with any Ministers of the Crown whose area of responsibility includes an interest in the proposed statement. In this case, I seek your comments as the MPS is relevant to your portfolio responsibilities as Minister of Defence.

If you have any comments, I would be grateful to receive these by **[date]**.

Given the New Zealand Defence Force also undertakes intelligence and capacity-building cooperation with overseas authorities, I would welcome any insights that you may have on overseas cooperation, and ways that we might better align our respective portfolios' policies on foreign cooperation. You may also have comments in relation to any issues being considered as part of the government's response to the Operation Burnham Inquiry. Officials from the Department of the Prime Minister and Cabinet have liaised with officials from the Ministry of Defence and the New Zealand Defence Force and their feedback has been incorporated in the attached draft.

Yours sincerely

Hon Andrew Little
Minister Responsible for the GCSB
Minister Responsible for the NZSIS

ATTACHMENT G

Letter to Hon Meka Whaitiri, Minister of Customs

Hon Meka Whaitiri
Minister of Customs
Parliament Buildings

Dear Minister Whaitiri

Consultation on Ministerial Policy Statement – Cooperating with Overseas Public Authorities

I enclose for your comment a draft of the revised Ministerial Policy Statement (MPS) regarding GCSB and NZSIS cooperation with overseas public authorities.

Sections 206 and 207 of the Intelligence and Security Act (the Act) requires the Minister(s) responsible for the intelligence and security agencies to issue MPSs about certain lawful activities carried out by the agencies. The MPSs are required to be reviewed within three years from the date they take effect.

MPSs are a mechanism for the responsible Minister(s) to set expectations and provide guidance about the conduct of those activities. MPSs do not affect the lawfulness of the activities, but may be taken into account by the Inspector-General of Intelligence and Security when they are assessing the propriety of the agencies' activities. As the current Minister responsible for both the GCSB and the NZSIS, I must review and reissue the MPSs.

Under section 212 of the Act I am required to consult with any Ministers of the Crown whose area of responsibility includes an interest in the proposed statement. In this case, I seek your comments as the MPS is relevant to your portfolio responsibilities as Minister of Customs.

If you have any comments, I would be grateful to receive these by **[date]**.

Given the New Zealand Customs Service also undertake similar cooperation with overseas authorities, I would welcome any insights that you may have on overseas cooperation or ways that we might better align our respective portfolios' policies on foreign cooperation. Officials from the Department of the Prime Minister and Cabinet have liaised with officials from NZ Customs and their feedback has been incorporated in the attached draft.

Yours sincerely

Hon Andrew Little
Minister Responsible for the GCSB
Minister Responsible for the NZSIS

Briefing

MINISTERIAL POLICY STATEMENT: COOPERATING WITH OVERSEAS PUBLIC AUTHORITIES – APPROVAL TO REISSUE

To Minister Responsible for the GCSB and NZSIS (Hon Andrew Little)			
Date	12/03/2021	Priority	Routine
Deadline	26/03/2021	Briefing Number	2021NSP/066


Purpose

This briefing seeks your approval to reissue the revised Ministerial Policy Statement (MPS): Cooperating with overseas public authorities. The revised MPS and draft letters to the Director-General of Security and the Director-General of the Government Communications Security Bureau, attaching the MPS and setting out your expectations in relation to implementing the revised MPS, are appended for your signature.

Recommendations

1. **Note** that all consultation required under the Intelligence and Security Act 2027 has been undertaken on the revised MPS: Cooperating with overseas public authorities;
2. **Agree** not to amend the MPS to incorporate the feedback received from the Minister of Justice, as it would mean the MPS does not align with the Intelligence and Security Act 2017 (see para 5); YES / NO
3. **Sign** the attached letter to the Minister of Justice, notifying him of your decision not to amend the MPS proposed in his feedback; YES / NO
4. **Agree** to reissue the revised MPS: Cooperating with overseas public authorities; YES / NO
5. **Sign** the attached letters to the Director-General of Security and the Director-General of the Government Communications Security Bureau, attaching the revised MPS and setting out your expectations in relation to implementing the revised MPS; YES / NO

6. **Note** that the Directors-General of the intelligence and security agencies are required to make the MPS publicly available on their Internet site as soon as practicable after the MPS is reissued; and
7. **Note** that DPMC will work with your office to ensure the revised MPS is referred to the Intelligence and Security Committee, as required by section 207 (2) of the Intelligence and Security Act 2017.


Tony Lynch
Deputy Chief Executive
National Security Group

12.3./2021

Hon Andrew Little
Minister Responsible for the GCSB
Minister Responsible for the NZSIS

...../...../2021

Contact for telephone discussion if required:

Name	Position	Telephone	1st contact
Pip Swaney	Manager, Security and Intelligence Policy	s9(2)(a)	
Lynda Byrne	Principal Policy Advisor, Security and Intelligence Policy	s9(2)(a)	✓

Minister's office comments:

- Noted
- Seen
- Approved
- Needs change
- Withdrawn
- Not seen by Minister
- Overtaken by events
- Referred to

NSP/

MINISTERIAL POLICY STATEMENT: COOPERATING WITH OVERSEAS PUBLIC AUTHORITIES – APPROVAL TO REISSUE

Purpose

1. This briefing seeks your approval to reissue the revised Ministerial Policy Statement (MPS): Cooperating with overseas public authorities. The revised MPS and draft letters to the Director-General of Security and the Director-General of the Government Communications Security Bureau, attaching the MPS and setting out your expectations in relation to implementing the revised MPS, are appended for your signature.

Reviewing the MPS: Cooperating with overseas public authorities

2. We have completed the review of the MPS: Cooperating with overseas public authorities. We briefed you recently on the main changes to the MPS (2021NSP/030), which include:
 - Removing common content of the MPSs into a cover-sheet that sets out the overarching purpose of the MPSs
 - Clarifying it only applies to lawful activity
 - Including a human rights assessment framework
 - Providing consistency in the threshold that should be applied when assessing when information should not be shared (where there is a real risk of contributing to human rights abuses)
 - Providing criteria the agencies need to take into account when referring a written arrangement to the Intelligence and Security Committee.

Ministerial consultation on the MPS

3. You consulted the following Ministers on the revised MPS, as required under the Intelligence and Security Act 2017 (the Act):
 - Minister of Foreign Affairs
 - Minister of Police
 - Minister of Justice
 - Minister of Immigration
 - Minister of Defence

- Minister of Customs.
4. The Ministers of Immigration, Customs and Defence responded to say they were happy with the revised MPS and were pleased it took their agencies' feedback into account. The Minister of Foreign Affairs and the Minister of Police did not respond.
 5. The Minister of Justice suggested that *'rather than just referring to rights recognised in New Zealand law, it could more broadly refer to New Zealand law and international obligations under Treaties New Zealand has signed up to'*. We considered this feedback, but do not recommend the MPS is amended as a result. This is because:
 - a) The term in the MPS *'all human rights obligations recognised by New Zealand law'* is the wording from the Act. Amending this text would make the MPS inconsistent with the Act;
 - b) The proposed wording suggested by the Minister of Justice is not an exhaustive list of the agencies' relevant legal obligations as, in addition to domestic law and treaties (generally implemented through domestic law), these obligations may also be sourced in customary international law and UNSC resolutions; and
 - c) Paragraph 13 of the MPS signals there are a range of obligations which apply to the agencies, and the core human rights obligations are set out in an Appendix to the MPS. It is not necessary to provide an exhaustive list of obligations in the body of the MPS.
 6. The Ministry of Justice did not raise this feedback during cross-agency consultation. GCSB and NZSIS agree that the MPS should not be amended as a result of the Minister of Justice's feedback.
 7. We therefore recommend you agree to issue the MPS, and to do so without the Minister of Justice's proposed amendment. If you agree, we have attached a letter for you to send to the Minister of Justice notifying him of this.

You agreed to provide additional guidance on two matters when the MPS is reissued

8. In December 2020 (2021NSP/030), you agreed to provide additional guidance, over and above the MPS itself, to the agencies on two matters:

- s6(a)



- s6(a)



s6(a)



9. Additional guidance on these matters has been set out in the attached letters to the Directors-General. We suggest the letter is copied to the Inspector-General of Intelligence and Security and forwarded to the Intelligence and Security Committee as these matters are relevant to their oversight roles.

Consultation

10. GCSB and NZSIS were consulted on the recommendation resulting from the Ministerial consultation on the MPS and their feedback was incorporated. The agencies were also invited to correct any factual errors in a draft version of this briefing.

Next steps

11. We attach draft letters from you to the Director-General of Security and the Director-General of the Government Communications Security Bureau to confirm you have approved the reissue of this MPS. In addition to the matters above, the letters request that the Directors-General fully implement any changes to internal policies, work programmes and training to implement the revised MPS. This includes revising the Joint Policy Statement on Human Rights Risk Management (JPS). This MPS and the JPS must be referred to the ISC for noting. We will work with your office and the GCSB and NZSIS to ensure this occurs in a timely fashion.
12. If you agree to the revised MPS being reissued, we will arrange for publication on the New Zealand Intelligence Community website on 1 April 2021.
13. We are working towards the other MPSs being ready to be reissued in mid-2021.

Attachments:		
Attachment A:	UNCLASSIFIED	Revised Ministerial Policy Statement: Cooperating with overseas public authorities
Attachment B:	RESTRICTED	Letter to Director-General of Security
Attachment C:	RESTRICTED	Letter to Director-General of Government Communications and Security Bureau
Attachment D:	UNCLASSIFIED	Letter to Hon Kris Faafoi, Minister of Justice

ATTACHMENT A

Revised ministerial policy statement: Cooperating with overseas public authorities

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BRIEFING: MINISTERIAL POLICY STATEMENT: COOPERATING WITH OVERSEAS PUBLIC AUTHORITIES – APPROVAL TO REISSUE	2021NSP/066
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Ministerial Policy Statements

1. Ministerial Policy Statements (MPSs) are statements issued by the Minister Responsible for the GCSB and NZSIS under section 206 and 207(1) of the Intelligence and Security Act 2017 ('the Act').

MPSs provide guidance to GCSB and NZSIS on certain lawful activities

2. MPSs provide guidance to GCSB and NZSIS (also called 'the agencies') on lawful activities under the Act. They do not act as legal authorisations for these activities but set out the Minister's expectations of how the activities covered by the MPS should be properly carried out and any protections or restrictions in relation to the activity. Activities which are unlawful may only be carried out to the extent that they can be authorised under an intelligence warrant.
3. Every employee making decisions or taking any action in relation to the matters covered by the MPSs must consider and should be able to explain how they had regard to the MPS. This might include an explanation of the consideration of any relevant internal policy or procedures that reflect the MPS. The Directors-General of the GCSB and NZSIS are responsible for ensuring each MPS is reflected in their agency's internal policies and procedures. If any action is taken that is inconsistent with the MPS, employees must be able to explain why that action was taken.

They are also considered by the Inspector-General of Intelligence and Security when conducting an inquiry or review

4. MPSs are relevant to the oversight of the agencies by the Inspector-General of Intelligence and Security in the exercise of their propriety jurisdiction. When conducting an inquiry or review, the Inspector-General of Intelligence and Security must take account of any relevant MPS and the extent to which an agency has complied with it.

And they assist in increasing transparency with the New Zealand public

5. While the primary purpose of the MPSs is to provide guidance to the agencies on their lawful activities, they also provide the public with information on how and why the agencies carry out these activities to help keep New Zealand secure.

Each of the activities covered by the MPSs enable the agencies to perform their statutory functions

6. The Act sets the principal objectives of GCSB and NZSIS, which are to contribute to:
 - The protection of New Zealand's national security;
 - The international relations and well-being of New Zealand; and
 - The economic well-being of New Zealand.
7. The GCSB and NZSIS meet these objectives through the performance of their statutory functions, namely:

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- Intelligence collection and analysis;
 - Protective security services, advice and assistance;
 - Cooperation with other public authorities to facilitate their functions; and
 - Cooperation with other entities to respond to imminent threat.
8. All collection and analysis of intelligence undertaken by GCSB and NZSIS is in accordance with the New Zealand Government's priorities. These are primarily established through the National Security and Intelligence Priorities (NSIPs) which are set by the Government and reviewed every two years. The NSIPs outline the focus areas for all intelligence and assessment activity across the national security sector, including GCSB and NZSIS.
9. MPSs are an important part of the measures put in place by the Act to ensure these functions are carried out properly.

Matters covered by the MPSs

10. The MPSs cover areas of work of the agencies that involve gathering information about individuals and organisations that may intrude into the privacy of individuals and other areas where ministerial guidance was considered appropriate. There are currently 11 MPSs, covering the following activities:
1. Providing information assurance and cybersecurity activities;
 2. Acquiring, using and maintaining an assumed identity;
 3. Creating and maintaining a legal entity (such as a cover company);
 4. Collecting information lawfully from persons without an intelligence warrant (human intelligence activities);
 5. Conducting surveillance in a public place;
 6. Obtaining and using publicly available information (open source information);
 7. Making requests for information from other agencies;
 8. Information management;
 9. Making false or misleading representations about being employed by an intelligence and security agency;
 10. Activities covered by the exemption from the Land Transport (Road User) Rule 2004; and
 11. Cooperation with overseas public authorities, including providing advice and assistance to and sharing intelligence with overseas public authorities.

[HYPERLINK TO EACH]

11. MPSs take effect from the date of signing and continue in effect for three years. The Minister responsible for GCSB and NZSIS may, amend, revoke or replace any of the MPSs at any time. However, they must consult with the Inspector-General of Intelligence and Security, any other relevant Minister, or any other person the Minister considers appropriate.
12. The Minister can issue further MPSs on other areas if considered necessary or desirable.

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Ministerial Policy Statement

Cooperating with overseas public authorities

[[Link to landing page on purpose of MPSs](#)]

Summary

It is important for New Zealand's security for GCSB and NZSIS to cooperate with overseas public authorities, including overseas intelligence agencies.

This Ministerial Policy Statement (MPS) provides guidance for GCSB and NZSIS in relation to cooperation with overseas public authorities. In making decisions related to foreign cooperation, employees must have regard to the following principles: respect for human rights, necessity, reasonableness and proportionality, protections for New Zealanders, information management and oversight. This MPS also specifies additional matters to be included in internal policy and procedures.

Definitions

Cooperation means to work together, and includes sharing intelligence and providing/receiving services, advice or assistance (including training, methodology and technology). This may be reciprocated or unreciprocated.

Overseas public authority means a foreign person or body that performs or exercises any public function, duty, or power conferred on that person or body by or under law.

Personal information means information about an identifiable individual.

This MPS provides guidance on overseas cooperation

1. New Zealand has a robust legislative framework to govern the activities of GCSB and NZSIS, including activities that involve cooperation with overseas public authorities. The Act includes obligations for GCSB and NZSIS to act in accordance with New Zealand law and all human rights obligations recognised by New Zealand law,¹ independently and impartially, with integrity and professionalism and in a manner that facilitates effective oversight.
2. Cooperation with foreign partners can sometimes pose a risk of acting unlawfully with both domestic legal obligations and international obligations, including a risk that New Zealand could

¹ Sections 10(3), 12(7), 17(a) and 18(b).

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become complicit in some forms of unlawful conduct by another country.² When undertaking overseas cooperation there is also a range of policy, human rights and reputational risks which need to be considered and managed. Consistent with New Zealand's respect for, and promotion of human rights, this MPS therefore provides policy guidance to, and sets expectations on, GCSB and NZSIS that extend beyond their legal obligations.

Scope of this MPS

3. This MPS applies to GCSB and NZSIS when cooperating with an overseas public authority (whether individually, jointly or with other government agencies). Cooperation may occur in relation to the performance of any of the functions of GCSB and NZSIS in sections 10 to 15 of the Act.
4. Cooperation must be lawful to be within scope of this MPS. Before and during foreign cooperation, GCSB and NZSIS must ensure their actions are consistent with their legal obligations. If in doubt, legal advice must be sought. Failure to act in accordance with New Zealand law could lead to possible criminal responsibility for employees of GCSB and NZSIS.

Context

Ministerial authorisation to cooperate

5. GCSB and NZSIS must obtain Ministerial authorisation where foreign cooperation involves the provision of intelligence, analysis or threat reporting.³ Ministerial authorisation can be sought on a case-by-case basis, for example to provide specific intelligence during a conference or event (such as APEC). Alternatively, Ministerial authorisation can be sought on a standing basis to provide intelligence to a range of overseas public authorities on an on-going basis.
6. Standing authorisations must be reviewed regularly to ensure that cooperation undertaken under the authorisation remains consistent with the principles in this MPS. In particular, if there are increased risks for ongoing cooperation either from changes to the domestic law, policy or practice of the overseas public authority subject to a standing authorisation, or from evidence they have carried out a significant breach of human rights, the standing authorisation must be reviewed by the responsible Minister on advice by GCSB and NZSIS.
7. GCSB and NZSIS must ensure sufficient information regarding the human rights practices of the overseas public authority is provided to the Minister to support decision-making. Guidance on this is contained within Appendix One.

New Zealand's intelligence and security relationships

8. New Zealand gains significant value from cooperating with overseas public authorities, particularly within the current climate of global and transnational threats. Close and reliable intelligence relationships help GCSB and NZSIS prioritise and focus their resources on the areas most important

² Complicity is a legal term which recognises that while a state did not carry out the wrongful act, if it knowingly aided or assisted another state to commit that wrongful act, it may be liable by law.

³By contrast, GCSB and NZSIS may provide protective security services to any public authority in New Zealand or overseas without requiring Ministerial authorisation (in accordance with section 11(1)(a) of the Act).

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to New Zealand, while having access to a much greater pool of information, skills and technology that would not otherwise be available to New Zealand.

9. For example, an overseas partner may have specific linguistic or technical capabilities that GCSB and NZSIS need in order to obtain or assess intelligence relevant to New Zealand's security and intelligence priorities. Similarly, GCSB or NZSIS may provide intelligence to an overseas public authority to alert them to a potential threat to their security, which helps contribute to international security and New Zealand's overall international relations with that country.
10. In the context of protective security services, advice and assistance, GCSB or NZSIS may provide technology or expertise to an overseas public authority to develop, implement or improve upon their protective security arrangements - for example, providing expertise on conducting a security vetting assessment, information security systems or detecting and protecting against cybersecurity threats. Such cooperation helps overseas authorities store and protect New Zealand Government information and contributes to the recipient's national security and the security of their region.
11. The closest relationships GCSB and NZSIS have with overseas public authorities are those with equivalent agencies from Australia, Canada, the United Kingdom and the United States (often referred to as the "Five Eyes" partners). The relationships between Five Eyes partners are long-running, reciprocal, cover a wide range of topics, and involve a high degree of mutual trust, honesty and respect. The relationships provide New Zealand with knowledge and capability far beyond what we can afford on our own. These relationships work effectively due to the shared values and histories of the five countries and the strong relations between the governments of those countries. The depth of the Five Eyes relationship means that disparities in size, power and influence do not prevent any member from acting in the best interests of their own government, and members expect to be able to disagree on specific matters without damaging the broader relationship.
12. The GCSB and NZSIS may cooperate with overseas public authorities from countries beyond the Five Eyes. This cooperation may occur on an ongoing, relatively informal, or one-off basis. The reasons for cooperating with such authorities vary widely and may occur while performing any of the agencies' functions and as part of contributing to their objectives. Examples include providing support to a major event such as APEC or the Olympic Games, or helping implement a Protective Security framework with an overseas public authority.

International and domestic obligations

13. New Zealand's core human rights obligations are detailed at Appendix Two. These include the right to life, the right not to be subjected to torture, the right not to be subjected to cruel, inhuman or degrading treatment or punishment, and the right to liberty and security of the person. New Zealand is also subject to other international obligations. These can be from a range of sources, including customary law obligations or binding United Nations resolutions. These obligations can range in nature from requiring action, prohibiting conduct or recognising rights.
14. The New Zealand Government has a long-standing and strong opposition to the use of torture, cruel, inhuman or degrading treatment or punishment in all cases and under all circumstances, including in response to threats to national security. The prohibition of torture is non-derogable – it can never be violated by states under any circumstances. New Zealand is opposed to the use of